SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 119

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, PETITIONER

vs.

ROSENBERG BROTHERS & COMPANY

No. 120

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, PETITIONER

vs.

CALIFORNIA WINE ASSOCIATION

No. 121

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, PETITIONER

vs.

S. L. JONES & COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

64946—27—1

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In the Southern Division of the United States District Court, for the Northern District of California, Third Division.

IN ADMIRALTY.

No. 17,692.

ROSENBERG BROS. & CO., a Corporation,
Libelant,

vs.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, a Corporation,
Respondent.

No. 17,693.

CALIFORNIA WINE ASSOCIATION, a Corporation,
Libelant,

vs.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, a Corporation,
Respondent.

No. 18,046.

S. L. JONES & CO., a Corporation,
Libelant,

vs.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, a Corporation,
Respondent.

PRAECIPE FOR APOSTLES ON APPEAL.

To the Clerk of the Southern Division of the District Court of the United States for the Northern District of California, Third Division:

The United States Shipping Board Emergency Fleet [1*] Corporation, having appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the respective final decrees entered in the above-entitled causes in the above-entitled court, the said causes having been ordered consolidated and heard together in said District Court, and the parties having stipulated, and it having been ordered that the said causes may be consolidated on the appeals from said decrees, and that the pleadings, testimony, depositions and exhibits in said causes may be included in one record for the purposes of such appeals;

You are hereby requested to prepare and certify apostles on appeal, to be filed in said Appellate Court in due course, and to include in said apostles the following papers and documents and matters:

1. The matters as to all of said causes specified in subdivision (1) of Section 1 of Rule IV of the Rules in Admiralty for the United States Circuit Court of Appeals for the Ninth Circuit.

2. All of the pleadings in all of said causes, together with the exhibits annexed thereunto.

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*Page-number appearing at foot of page of original certified Apostles on Appeal.

3. All of the testimony, depositions, exhibits, stipulations between proctors other than stipulations extending time, and all other proofs adduced in said causes, exhibits consisting of charts, diagrams, advertisements, insurance documents, bills of lading, etc., to be sent up in their original form as original exhibits.

4. The opinion and decision and opinion and decision on exceptions of the District Court in said causes.

5. The final decrees in said causes and the notices of appeal therefrom.

6. The assignment of errors in said causes. [2]

7. The praecipe for apostles on appeal in said causes.

8. Stipulations and orders in said causes extending time to docket record.

9. All interlocutory orders of the District Court in said causes.

IRA S. LILLICK,
CHALMERS G. GRAHAM,
Proctors for United States Shipping Board Emergency Fleet Corporation.

Due service and receipt of a copy of the within praecipe for apostles is hereby admitted this 23d day of December, 1925.

J. M. MANNON, Jr.
FARNHAM P. GRIFFITHS.
EDWARD J. McCUTCHEON.

[Endorsed]: Filed Dec. 23, 1925. [3]

In the Southern Division of the United States District Court, Northern District of California, Third Division.

No. 17,692.

ROSENBERG BROS. & CO., a Corporation,

vs.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, a Corporation.

STATEMENT OF CLERK U. S. DISTRICT COURT.

PARTIES.

Libelant: Rosenberg Bros & Co., a Corp.

Respondent: United States Shipping Board Emergency Fleet Corporation, a Corp.

PROCTORS.

For Libelant: J. M. Mannon, Jr., Esq., Farnham P. Griffiths, Esq., McCutcheon, Olney, Mannon & Greene.

For Respondent: Ira S. Lillick, Esq.

PROCEEDINGS.

1922

Oct. 25. Filed libel.

Issued citation, which was returned executed.

1923.

May 10. Filed exceptions to libel. [4]

May 21. Ordered that the exceptions to libel be submitted (Hon. John S. Partridge, Judge.)

Dec. 26. Filed opinion. Ordered that the exceptions to the libel be overruled.

1924.

Feb. 4. Filed answer to libel, with interrogatories attached.

Jun. 17. Filed answers to interrogatories propounded to libelant.

Nov. 20. Filed agreed statement of facts.

Dec. 29. Hearing of issues (Hon. Frank H. Kerrigan, Judge.

Filed deposition of Walter H. Strong.

Dec. 30. Hearing resumed.

Dec. 31. Hearing resumed.

1925.

Jan. 2. Hearing resumed.

Jan. 6. Hearing resumed.

Jan. 7. Hearing resumed. Ordered cause submitted.

Sept. 23. Filed opinion. Ordered that a decree be entered in favor of libelant.

Sept. 24. Filed final decree.

Oct. 23. Filed motion to modify final decree.

Oct. 26. Motion to modify final decree denied.

Nov. 13. Filed notice of appeal.

Filed cost bond on appeal.

Dec. 14. Motion to stay execution submitted.

Dec. 23. Filed assignment of errors.

Filed praecipe for apostles on appeal.

[5]

In the Southern Division of the United States District Court for the Northern District of California, Third Division.

IN ADMIRALTY—No. 17,692.

ROSENBERG BROS. & CO., a Corporation,
Libelant,

vs.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, a Corporation,
Respondent.

LIBEL IN PERSONAM.

To the Honorable M. T. DOOLING, Judge of the Southern Division of the United States District Court, for the Northern District of California:

The libel of Rosenberg Bros. & Co., a corporation, against United States Shipping Board Emergency Fleet Corporation, a corporation, in a cause of contract and deviation, civil and maritime, respectfully shows:

FIRST CAUSE OF LIBEL.

I.

That libelant is and at all times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of California.

II.

That respondent United States Shipping Board Emergency Fleet Corporation is and at all times herein mentioned was a corporation duly organized and existing under and by virtue [6] of the laws of the District of Columbia, doing business in the state of California, and having its principal office and place of business in said state at 369 Pine Street in the city and county of San Francisco.

That at all times herein mentioned the steamer "West Aleta" was an American steamer operated by the respondent United States Shipping Board Emergency Fleet Corporation solely as a merchant vessel.

III.

That libelant heretofore and to wit, on or about between the thirty-first day of December, 1919, and the sixth day of January, 1920, delivered in good order and condition at San Francisco, California, to respondent fifteen hundred (1500) sacks of rice for carriage, by said steamer "West Aleta" as a common carrier of merchandise by sea, upon a voyage to Rotterdam, Holland, and delivery there in like good order and condition unto the order of said libelant. That respondent duly received said fifteen hundred (1500) sacks of rice on board said steamer as such common carrier of merchandise by sea and agreed to carry the same by said steamer to Rotterdam, Holland, and there to deliver said rice as aforesaid.

IV.

That respondent duly issued its bills of lading

on account of the said shipment on the dates and for the quantities following, to wit:

(1) On the thirty-first day of December, one thousand nine hundred and ninteen, for five hundred (500) sacks.

(2) On the thirty-first day of December, one thousand nine hundred and nineteen, for five hundred (500) sacks. [7]

(3) On the thirty-first day of December, one thousand nine hundred and nineteen, for two hundred thirty-eight (238) sacks.

(4) On the sixth day of January, one thousand nine hundred and twenty, for two hundred sixty-two (262) sacks.

V.

That the full amount of freight charged and due for said shipment was the sum of three thousand and thirty (3,030) dollars, which said libelant prepaid.

VI.

That on or about the sixth day of January, 1920, said steamer "West Aleta," having on board said fifteen hundred (1500) sacks of rice, sailed from San Francisco, California; that instead of proceeding upon the agreed voyage to said port of Rotterdam, Holland, said vessel, with the knowledge and privity of respondent, and pursuant to respondent's orders and directions, deviated from said voyage and proceeded on an entirely different voyage to the port of Hamburg, Germany; that during the course of said deviation and after the said steamer "West Aleta" had passed far beyond the said port

of Rotterdam, without entering said port, she stranded upon Terschelling Island (in the North Sea), and became a total loss.

VII.

That by reason of said deviation, stranding and loss of the said steamer "West Aleta" the said fifteen hundred (1500) sacks of rice were totally lost, all to the damage of said libelant in the sum of sixteen thousand one hundred thirty-four (16,-134) dollars. [8]

SECOND CAUSE OF LIBEL.

I.

That libelant is and at all times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of California.

II.

That respondent United States Shipping Board Emergency Fleet Corporation is and at all times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the District of Columbia, doing business in the State of California, and having its principal office and place of business in said state at 396 Pine Street in the city and county of San Francisco.

That at all times herein mentioned the steamer "West Aleta" was an American steamer operated by the respondent United States Shipping Board Emergency Fleet Corporation solely as a merchant vessel; that at all times herein mentioned the steamer "Cockaponset" was an American steamer

operated by said respondent solely as a mercha vessel.

III.

That libelant heretofore, and to wit, on or abo the fifteenth day of December, 1919, delivered good order and condition at San Francisco, Ca fornia, to respondent four thousand (4,000) sac of rice, for carriage by said steamer "Cockapo set," as a common carrier of merchandise by s upon a voyage to Rotterdam, Holland, and delive there in like good order and condition unto t order of said libelant; that respondent duly r ceived said four thousand (4,000) sacks of rice a agreed to carry the same by said steamer to Rott dam, Holland, and there to deliver said rice aforesaid. [9]

IV.

That respondent duly issued its bill of lading account of said shipment of four thousand (4,00 sacks of rice on the fifteenth day of Decemb 1919.

V.

That the full amount of freight charged and d for said shipment was the sum of eight thousa one hundred and sixty (8,160) dollars, which su libelant prepaid.

VI.

That respondent wrongfully neglected to ship s hundred and eighty (680) of said four thousa (4,000) sacks of rice by the said steamer "Cock ponset" and said vessel sailed from San Francis without having on board said six hundred a

eighty (680) sacks of rice; that thereafter respondent placed said six hundred and eighty (680) sacks of rice aboard the said steamer "West Aleta" for shipment to said port of Rotterdam, Holland.

VII.

That on or about the 6th day of January, 1920, said steamer "West Aleta," having on board said six hundred and eighty (680) sacks of rice, sailed from San Francisco, California; that instead of proceeding upon a voyage from San Francisco to said port of Rotterdam, Holland, said vessel, with the knowledge and privity of respondent and pursuant to respondent's orders and instructions, deviated from said voyage and proceeded on an entirely different voyage to the port of Hamburg, Germany; that during the course of said deviation and after the said "West Aleta" had passed far beyond the said port of Rotterdam, Holland, without entering said port, she stranded on Terschelling Island (in the North Sea) and became a total loss.

VIII.

That by reason of said deviation, stranding and loss of [10] the said steamer "West Aleta," the said six hundred and eighty (680) sacks of rice were totally lost, all to the damage of said libelant in the sum of seven thousand five hundred and eighty-two (7,582) dollars.

WHEREFORE, libelant prays that process in due form of law according to the course and practice of this Honorable Court in causes of admiralty and maritime jurisdiction and in accordance with

acts of Congress in such cases made and provided, may issue to and against the said respondent, the United States Shipping Board Emergency Fleet Corporation, citing and admonishing it to appear and answer upon oath all and singular the matters aforesaid, and that this Honorable Court will be pleased to pronounce for and award to libelant its damages aforesaid, with interest and costs, and will enter a decree for said damages, interest and costs in favor of libelant and against respondent, and that libelant may have such other and further relief in the premises as in law and justice it may be entitled to receive.

J. M. MANNON, Jr.,
FARNHAM P. GRIFFITHS,
McCUTCHEON, OLNEY, WILLARD,
MANNON & GREENE,
Proctors for Libelant. [11]

State of California,
City and County of San Francisco,—ss.

R. S. Geen, being first duly sworn, deposes and says:

That he is an officer, to wit, the secretary of Rosenberg Bros. & Co., a corporation, libelant in the above-entitled cause; that said Rosenberg Bros. & Co. is a corporation duly organized and existing under and by virtue of the laws of the State of California; that affiant makes this verification for and on behalf of the libelant for the reason that it is a corporation as aforesaid; that he has read the foregoing libel and knows the contents thereof,

and that the same is true to the best of his knowledge, information and belief; that the sources of his knowledge or information are documents, correspondence and papers coming to his attention as such officer of said corporation.

R. S. GEEN.

Subscribed and sworn to before me this 11th day of October, 1922.

[Seal] RAY S. FEDER,

Notary Public in and for the City and County of San Francisco, California. [12]

INTERROGATORIES ADDRESSED TO RESPONDENT TO BE ANSWERED BY IT UNDER OATH.

First Interrogatory.

Did respondent, or its agents, give the steamer "West Aleta," or its officers, any sailing orders prior to its departure from San Francisco, California, on or about the sixth day of January, 1920?

Second Interrogatory.

If the answer to the foregoing first interrogatory shall be in the affirmative, attach a true and correct copy of said sailing orders to the answer to these interrogatories.

Third Interrogatory.

Did respondent or its agents at any time or times prior to the departure of said steamer "West Aleta" from San Francisco, California, on or about the sixth day of January, 1920, give said vessel, or its officers, any orders, instructions or directions in

writing, other than said sailing orders, respecting the ports of call of said vessel upon the voyage about to be commenced, or respecting the orders of calling thereat?

Fourth Interrogatory.

If the answer to the foregoing third interrogatory shall be in the affirmative, attach true and correct copies of all said orders, instructions and directions to the answer to these interrogatories. [13]

Fifth Interrogatory.

Did respondent or its agents at any time or times prior to the departure of said steamer "West Aleta" from San Francisco, California, on or about the sixth day of January, 1920, give said vessel, or its officers, any orders, instructions, or directions, in any other way than in writing, respecting the ports of call of said vessel upon the voyage about to be commenced, or respecting the order of calling thereat?

Sixth Interrogatory.

If the answer to the foregoing fifth interrogatory shall be in the affirmative, state fully what all said orders, instructions and directions were.

Seventh Interrogatory.

After the departure of said steamer "West Aleta" from San Francisco, California, on or about the sixth day of January, 1920, did respondent or its agents give any orders, instructions or directions in writing to said vessel or its officers respecting

ports at which said vessel should call on said voyage or the order of calling at said ports?

Eighth Interrogatory.

If the answer to the foregoing seventh interrogatory shall be in the affirmative, attach true and correct copies of said orders, instructions and directions to the answer to these interrogatories.

Ninth Interrogatory.

After the departure of said vessel from San Francisco, California, on or about the sixth day of January, 1920, [14] did respondent or its agents give any orders, instructions or directions in any other way than in writing to said vessel or its officers respecting ports at which said vessel should call on said voyage, or the order of calling at said ports?

Tenth Interrogatory.

If respondent's answer to the foregoing ninth interrogatory shall be in the affirmative, state fully what said orders, instructions and directions were and how given.

Eleventh Interrogatory.

What was the first port of call of said steamer "West Aleta" on the voyage from San Francisco, California, leaving on or about the sixth day of January, 1920?

Twelfth Interrogatory.

To what first port of call was said steamer "West

Aleta" bound at the time of her stranding in or about the month of February, 1920?

J. M. MANNON, Jr.,
FARNHAM P. GRIFFITHS,
McCUTCHEON, OLNEY, WILLARD,
MANNON & GREENE,
Proctors for Libelant.

[Endorsed: Filed Oct. 25, 1922. [15]

[Title of Court and Cause.]

IN ADMIRALTY—No. 17,692.

EXCEPTIONS TO LIBEL.

To the Honorable, the Judges of the Southern Division of the United States District Court for the Northern District of California:

Now comes the United States Shipping Board Emergency Fleet Corporation, above-named respondent, appearing herein by its proctor, Ira S. Lillick, and excepts to the libel, and each alleged cause of libel therein contained, on file herein, upon the following grounds:

I.

That neither said libel, nor either of the alleged causes of libel set forth therein, state facts sufficient to constitute a cause of libel against respondent herein. [16]

II.

That neither said libel, nor either of the alleged causes of libel set forth therein, state facts sufficient

to confer jurisdiction upon this Court, and said Court is without jurisdiction of the matters contained in said libel, and each count thereof.

Further excepting to said libel, and particularly to the first alleged cause of libel therein contained, respondent specifies:

I.

That said first alleged cause of libel fails to state facts sufficient to constitute a cause of libel against respondent herein.

II.

That said alleged cause of libel fails to state facts sufficient to confer jurisdiction upon this Court, and said Court is without jurisdiction over the matters contained therein.

III.

That said alleged cause of libel fails to allege that the steamship "West Aleta" was employed, and/or operated, as a merchant vessel at the time of the filing of said libel, or at the commencement of the said cause of action therein contained.

IV.

That at the time of the filing of said libel herein, the steamship "West Aleta" was not within the Northern District of California, nor within the jurisdiction of this Court. [17]

V.

That at the time of the filing of this libel herein, the steamship "West Aleta" was not within the territorial limits of the United States, nor of its possessions, nor within the jurisdiction of this Court.

VI.

That at the time of the filing of said libel herein, more than one year had elapsed since the coming into effect of that certain act of Congress, known as Suits in Admiralty Act, March 9, 1920, and particularly Section 5 thereof, and that by and under the provisions of said act, the said alleged causes of libel set forth in said libel, and each thereof, are barred.

VII.

That said libel, and particularly the first count thereof, is insufficient, in the following:

(a) That it cannot be ascertained from Article III therein contained upon what route respondent agreed to carry, and/or transport, the merchandise specified therein to Rotterdam, Holland.

(b) That it cannot be ascertained from Article VI therein contained what voyage is meant by the agreed voyage to said port of Rotterdam, Holland.

(c) That it cannot be ascertained from article VI therein contained whether or not the port of Hamburg was a port of call, to which said steamer "West Aleta" was privileged to call on the voyage agreed upon in the bill of lading.

Further excepting to said libel, and particularly to the second alleged cause of libel therein contained, respondent specifies: [18]

I.

Said respondent hereby refers to paragraphs I, II, III, IV, V and VI of its exceptions to the first alleged cause of libel herein contained, and incor-

porates each and all of said paragraphs, as though fully set forth herein.

II.

That said libel, and particularly the second count thereof, is insufficient in the following:

(a) That it cannot be ascertained from Articles III and/or VI therein contained upon what route respondent agreed to carry, and/or transport, the merchandise specified therein to Rotterdam, Holland.

(b) That it cannot be ascertained from Article VII therein contained whether or not the port of Hamburg, Germany, was a port of call, to which said steamers "Cockaponset" and/or "West Aleta," or either of them, were privileged to call on the voyage agreed upon in the bills of lading.

WHEREFORE, respondent prays that said libel herein be dismissed, and that respondent have judgment for its costs of suit herein.

IRA S. LILLICK,
Proctor for Respondent.

Receipt of a copy of the within exceptions to libel is hereby admitted this 10 day of May, 1923.

McCUTCHEN, OLNEY, MANNON & GREENE,
Proctors for Libelant.

[Endorsed]: Filed May 10, 1923. [19]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the city and county of San Francisco, on Wednesday, the 26th day of December, in the year of our Lord one thousand nine hundred and twenty-three. Present: The Honorable WILLIAM H. HUNT, Judge, et al.

[Title of Cause.]

No. 17,692.

MINUTES OF COURT—DECEMBER 26, 1923—ORDER DIRECTING FILING OF OPINION AND OVERRULING EXCEPTIONS TO LIBEL.

Pursuant to opinion of Judge John S. Partridge, this day received, it is ordered that said opinion be filed and that the exceptions to the libel heretofore submitted be and the same are hereby overruled, with 10 days allowed to answer. [20]

In the Southern Division of the United States District Court for the Northern District of California, Third Division.

IN ADMIRALTY—No. 17,692.

ROSENBERG BROS. & CO., a Corporation,

Libelant,

vs.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, a Corporation,

Respondent.

IN ADMIRALTY—No. 17,693.

CALIFORNIA WINE ASSOCIATION, a Corporation,

Libelant,

vs.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, a Corporation,

Respondent.

OPINION.

PARTRIDGE, JOHN S.—These two actions arise from the loss of the steamer "West Aleta." In the Rosenberg case, the libel alleges that the libelant shipped on the "West Aleta" fifteen hundred (1500) bags of rice, consigned to Rotterdam. In addition, libelant delivered to respond-

ent four thousand (4,000) bags of rice for shipment on the "Cockaponset" for Rotterdam, but that respondent diverted six hundred and eighty (680) bags of this second lot, and shipped them on the "West Aleta." The value of this rice is alleged to be the sum of twenty-three thousand seven hundred and sixteen dollars ($23,716.00).

In the California Wine Association case, libelant shipped on the "West Aleta" eleven thousand (11,000) barrels of wine, for shipment to Cardiff, and two thousand nine hundred [21] and ninety-two (2,992) barrels of wine and eleven hundred and eight (1108) barrels of brandy for shipment to Rotterdam. The value of the wine and brandy is alleged to be six hundred forty-two thousand eight hundred and seventy-one dollars ($642,871.00).

All the goods in both cases were shipped from San Francisco.

Both libels then allege that the "West Aleta" deviated from her voyage and proceeded on an entirely different voyage to Hamburg, and that during this deviation she stranded upon Terschelling Island in the North Sea and, as a result of the deviation, the ship and goods became a total loss.

Both libels likewise allege that "at all times herein mentioned" the vessel was an American steamer operated by respondent solely as a merchant vessel.

To these libels exceptions are filed directly attacking the jurisdiction of the court. The reasons

for this attack are that it affirmatively appears that at the time of the filing of the libels, the "West Aleta" was not operated as a merchant vessel nor was she within the territorial limits of the United States or its possessions, nor within the jurisdiction of the court.

In addition to that, the exceptions set up that at the time of the filing of the libel more than a year had elapsed since the going into effect of the Suits in Admiralty Act of March 9, 1920, and that, therefore, the causes of libel are barred by Section 5 thereof.

There is thus squarely presented to the Court the questions:

1. What is the status of a libel for the recovery of damages sustained by the loss of goods on a vessel operated by the Emergency Fleet Corporation when the [22] suit is filed more than one year after the Act went into effect:

2. Do the sections of the statute limiting actions to causes in which the vessel was employed in the merchant service and physically within the United States, apply where she has, by wrongful deviation become a total loss?

The principle that the sovereign cannot be sued without his consent found no ready acceptance in these United States. It was, of course, settled law in England, at the time of the Revolution; although, as a practical matter, leave was almost always granted upon a Petition of Right. The doctrine was strongly urged in the Federalist, No. 81, in the following language:

> "It is inherent in the nature of sovereignty not to amenable to the suit of an individual without his consent. This is the general sense, and general practice of mankind."

But it certainly was not considered the "general sense" of this country by the first Chief Justice of the Supreme Court of this Republic. On the contrary, he most vigorously and picturesquely repudiated it, as unsuited to a free people—a people who were themselves the sovereign, and the only sovereign, ruling themselves by their duly elected representatives. (Chisholm vs. Georgia, 2 Dall, 419.)

In the same case Mr. Justice Blair used this language: "To the Constitution of the United States, the term sovereign is totally unknown. There is but one place where it could have been used with propriety. But, even in that place, it would not, perhaps, have comported with the delicacy of those who ordained and established that Constitution. They might have announced themselves 'sovereign' people of the [23] United States; but, serenely conscious of the *fact,* they avoided the *ostentatious declaration.*"

In this case, however, the first Chief Justice did perceive a difference between a suit against a state, and against the United States. The language is as follows:

> "I perceive, and therefore candor urges me to mention, a circumstance, which seems to favor the opposite side of the question. It is this: the same section of the constitution which

extends the judicial power to controversies 'between a state and the citizens of another state,' does also extend that power to controversies to which the United States are a party. Now, it may be said, that if the word, party, comprehends both plaintiff and defendant, it follows, that the United States may be sued by any citizen, between whom and them there may be a controversy. This appears to me to be fair reasoning; but the same principles of candor which urge me to mention this objection, also urge me to suggest an important difference between the two cases. It is this: in all cases of actions against states or individual citizens, the national courts are supported in all their legal and constitutional proceedings and judgments, by the arm of the executive power of the United States; but in the cases of actions against the United States, there is no power which the courts can call to their aid. From this distinction important conclusions are deducible, and they place the case of a state and the case of the United States, in very different points of view.

"I wish the state of society was so far improved, and the science of government advanced to such a degree of perfection, as that the whole nation could in the peaceable course of law, be compelled to do justice, and be sued by individual citizens. Whether that is or is not, now the case, ought not to be thus collater-

ally and incidentally decided: I leave it a question."

(1 L. Ed. 465.)

Cohens vs. Virginia, 6 Wheat. 380, is usually cited as the first case in which the Supreme Court recognized the general doctrine of immunity from suit. This, however, merely depends upon the general language of Chief Justice Marshall. And, in fact, the Chief Justice, in one of the greatest expositions of true political opinions ever written in any language, held that jurisdiction did attach. This case was, like Chisholm vs. Virginia, a suit against a state, and did not in anywise involve the question of a suit against the United States.

Almost a hundred years after the decision in Chisholm vs. Georgia, Mr. Justice Miller, in United States vs. Lee, 106 U. S. 196, said: [24]

> "And while the exemption of the United States and of the several states, from being subjected as defendants to ordinary actions in courts, has since that time been repeatedly asserted here, *the principle has never been discussed or the reasons for it given,* but it has always been treated as an established doctrine. U. S. vs. Clarke, 8 Pet. 436; Same vs. McLemore, 4 How. 286; Hill vs. U. S., 9 How. 386; Nation vs. Johnson, 24 How. 195 (65 U. S. XVI, 628); The Siren, 7 Wall. 152 (74 U. S. XIX, 129); The Davis, 10 Wall. 15 (77 U. S. XIX, 875)."

And, while, as Mr. Justice Miller said, no reasons *for the principle* had ever been given, a most per-

suasive argument had been made *against it* by Mr. Justice Blair in the Chisholm case. His language is as follows:

> "For in the practice, and even at length, in the science of politics there has very frequently been a strong current against the natural order of things, and an inconsiderate or an interested disposition to sacrifice the end to the means. As the state has claimed precedence of the people; so, in the same inverted course of things, the government has often claimed pre*de*dence of the state; and to this perversion in the second degree, many of the volumes of confusion concerning sovereignty owe their existence. The ministers, dignified very properly by the appellation of the magistrates, have wished, and have succeeded in their wish, to be considered as the sovereigns of the state. This second degree of perversion is confined to the old world, and begins to diminish even there; but the first degree is still too prevalent even in the several states, of which our Union is composed. By a state I mean, a complete body of free persons united together for their common benefit, to enjoy peaceably what is their own, and to do justice to others. It is an artificial person. It has its affairs and its interests: It has its rules: It has its rights: And it has its obligations. It may acquire property distinct from that of its members. It may incur debts to be discharged out of the public stock, not out of the private fortunes of indi-

viduals. It may be bound by contracts; and for damages arising from the breach of those contracts. In all our contemplations, however, concerning this feigned and artificial person, we should never forget, that, in truth and nature, those who think and speak and act, are men.

"Is the foregoing description of a state a true description? It will not be questioned, but it is. Is there any part of this description, which intimates in the remotest manner, that a state, any more than the men who compose it, ought not to do justice and fulfill engagements? It will not be pretended that there is. If justice is not done; if engagements are not fulfilled; is it upon general principles of right, less proper, in the case of a great number, than [25] in the case of an individual, to secure, by compulsion, that which will not be voluntarily performed? Less proper it surely cannot be. The only reason, I believe why a free man is bound by human laws, is, that he binds himself. Upon the same principles, upon which he becomes bound by the laws, he becomes amenable to the courts of justice, which are formed and authorized by these laws. If one free man, an original sovereign, may do all this, why may not an aggregate of free men, a collection of original sovereigns, do this likewise? If the dignity of each singly, is undiminished, the dignity of all jointly must be unimpaired. A state, like

a merchant, makes a contract; a dishonest state, like a dishonest merchant, wilfully refuses to discharge it: The latter is amenable to a court of justice: *Upon general principles of right shall the former when summoned to answer the fair demands of its creditors, be permitted, Proteuslike, to assume a new appearance, and to insult him and justice, by declaring, I am a sovereign state? Surely not. Before a claim, so contrary, in its first appearance, to the general principles of right and equality, be sustained by a just and impartial tribunal, the person, natural or artificial, entitled to make such claim, should certainly be well known and authenticated.*"

In United States vs. Lee, however, the doctrine is strictly limited. The language is:

"On the other hand, while acceding to the general proposition that in no court can the United States be sued directly by original process as a defendant, there is abundant evidence in the decisions of this court that the doctrine, if not absolutely limited to cases in which the United States are made defendants in name, is not permitted to interfere with the judicial enforcement of the established rights of plaintiffs, when the United States is not a defendant or a necessary party to the suit."

The Court then discusses the reasons why the English rule is not applicable to our form of government, and says:

"Under our system the people, who are there called subjects, are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in power or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, *not even the United States,* should prevent him from using the means which the law gives him for the protection and enforcement of that right."

Moreover, in the Lee case, the Court quotes this language of Chief Justice Marshall in United States vs. Peters, 5 Cranch, 115: [26]

". . . . *but it certainly can never be alleged that a mere suggestion of title in a State to property in possession of an individual, must arrest the proceedings of the Court, and prevent their looking into the suggestion and examining the validity of the title.*"

The opinion in the Lee case goes on to consider the contention that United States vs. Peters should be distinguished from a case in which the officers of the Government asserted no title in themselves, but admittedly held only as agents of the Government. But the Supreme Court considered that this contention was answered by the case decided

shortly after the Peters case, to wit, Meigs vs. McClung, 9 Cranch, 11. That case was against certain army officers who held land upon which the United States had erected expensive improvements as quarters for a garrison. The Lee case quotes the language of Chief Justice Marshall, *"that the plaintiff below might sustain his action"* as authority for the proposition that the immunity of the United States does not extend to its officers or agents. In Meigs vs. McClung, however, this point was not discussed or mentioned except in the single phrase quoted above and italicized by the Supreme Court. In Wilcox vs. Jackson, 13 Pet. 498, also, jurisdiction was entertained in a suit against officers of the army to dispossess them of a fort belonging to the United States. In that case, as in Meigs vs. McClung, the point does not appear to have been raised (although in the McClung case, it was among the exceptions). In relying upon Osborn vs. United States Bank, 9 Wheat. 738, however, the Supreme Court certainly found unquestioned authority and sound reasoning. The Supreme Court quotes from the Osburn case as follows:

> "A few citations from the opinion of Marshall, Ch. J., will show the views entertained by the court on the question thus raised. At page 842 of the long report of the case, he says: [27]
>
> " 'If the State of Ohio could have been made a party defendant, it can scarcely be denied that this would be a strong case for an in-

junction. The objection is that, as the real party cannot be brought before the court, a suit cannot be sustained against the agents of that party; and cases have been cited to show that a court of chancery will not make a decree, unless all those who are substantially interested be made parties to the suit. This is certainly true where it is in the power of the plaintiff to make them parties, but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong, which they would afford against him could his principal be joined in the suit.'

"In another place he says: 'The process is substantially, though not in form, against the State . . . . and the direct interest of the State in the suit as brought is admitted; and had it been in the power of the bank to make it a party, perhaps no decree ought to have been pronounced in the cause until the State was before the court. But this was not in the power of the bank, ... and the very difficult question is to be decided, whether, in such a case, the court may act upon agents employed by the State and on the property in their hands.' In answering this question he says: 'A denial of jurisdiction forbids all

inquiry into the nature of the case. It applies to cases perfectly clear in themselves; to cases where the Government is in the exercise of its best established and most essential powers, as well as to those which may be deemed questionable. It asserts that the agents of a State, alleging the authority of a law void in itself because repugnant to the Constitution, may arrest the execution of any law in the United States.' Again: 'The bank contends that in all cases in which jurisdiction depends on the character of the party, reference is made to the party on the record, not to one who may be interested, but is not shown by the record to be a party.' 'If this question were to be determined on the authority of English decisions, it is believed that no case can be adduced where any person can be considered as a party who is not made so in the record.' Again: 'In cases where a State is a party on the record, the question of jurisdiction is decided by inspection. If jurisdiction depend not on this plain fact, but on the interest of the state, what rule has the Constitution given by which this interest is to be measured? If no rule is given, is it to be settled by the court? If so, the curious anomaly is presented of a court examining the whole testimony of a cause, inquiring into and deciding on the extent of a State's interest, without having a right to exercise any jurisdiction in the case. Can this inquiry be made without the exercise of jurisdiction?' "

And the Supreme Court sums up its conclusions as follows: [28]

"This examination of the cases in this court establishes clearly this result: that the proposition that when an individual is sued in regard to property which he holds as officer or agent of the United States, his possession cannot be disturbed when that fact is brought to the attnetion of the court, has been overruled and denied in every case where it has been necessary to decide it; and that in many others, where the record shows that the case as tried below, actually and clearly presented that defense, it was neither urged by counsel nor considered by the court here, though, if it had been a good defense, it would have avoided the necessity of a long inquiry into plaintiff's title and of other perplexing questions, and have quickly disposed of the case. And we see no escape from the conclusion that, during all this period the court has held the principle to be unsound, and in the class of cases like the present, represented by Wilcox vs. Jackson, Brown vs. Huger, and Grisar vs. McDowell, it was not thought necessary to re-examine a proposition so often and so clearly over-ruled in previous well considered decisions."

And *on principle,* as follows:

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the Government, from the

highest to the lowest, are creatures of the law and are bound to obey it.

"It is the only supreme power in our system of government, and every man who, by accepting office, participates in its functions, is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

"Courts of justice are established not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the Government, and the docket of this court is crowded with controversies of the latter class.

"Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President, to be unconstitutional, that the courts cannot give remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the Government without any lawful authority, without any process of law and without any compensation, because the President has ordered it and his officers are in possession?

"If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well regu-

lated liberty and the protection of personal rights." [29]

United States vs. Lee, together with other cases, is cited by Mr. Justice Holmes in Philadelphia Co. vs. Stimson, 223 U. S. 605, where he says:

> "If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded."

In The Siren, 7 Wall. 152, the steamer had been captured as a blockade runner in the port of Charleston. Libel in prize was filed against her, and she was sold as lawful prize, and the proceeds deposited with the United States. Before the filing of the libel, and while proceeding in charge of a prize captain and crew, the "Siren" collided with the sloop "Harper." The owners of the latter vessel filed an intervening libel after the sale, claiming a lien upon the money for the damages sustained in the collision. Mr. Justice Field sustained jurisdiction in the following language:

> "But although direct suits cannot be maintained against the United States, nor against their property, yet, when the United States institute a suit, they waive their exemption so far as to allow a presentation by the defendant of setoffs, legal and equitable, to the extent of

the demand made or property claimed, and when they proceed *in rem,* they open to consideration all claims and equities in regard to the property libeled. They then stand in such proceedings, with reference to the rights of defendants or claimants, precisely as private suitors, except that they are exempt from costs and from affirmative relief against them, beyond the demand or property in controversy. In U. S. vs. Ringgold, 8 Pet. 150, a claim of the defendant was allowed as a setoff to the demand of the Government. 'No direct suit,' said the Court, 'can be maintained against the United States. But when action is brought by the United States to recover money in the hands of a party who has a legal claim against them, it would be a very rigid principle to deny to him the right of setting up such claim in a court of justice and turn him round to an application to Congress.' So in U. S. vs. Macdaniel, 7 Pet. 16, to which reference is made in the case cited, the defendant was allowed to setoff against the demand of the Government a claim for services as agent for the payment of the navy pension fund, to which the court held he was equitably entitled. The question, said the Court, was, whether the defendant should surrender the money which happened to be in his hands, and then petition Congress on [30] the subject; and it was held that the Government had no right, legal or equitable, to the money."

It is thus apparent that the Supreme Court has given but a reluctant assent to the doctrine of immunity from suit, albeit the principle, in its general form, is well established. It is likewise apparent that the Supreme Court has limited the doctrine to suits directly against the United States, or *in rem* against property to which it held the title—and not even then, when the officer or agent claimed *title* in the United States, and that title was put in issue.

Now, Mr. Justice Story, in the Malek Adhel, 2 How. 209, summarizes a well-known principle of maritime law as follows:

> "The ship is also, by the general maritime law, held responsible for the torts and misconduct of the master and crew thereof, whether arising from negligence or a willful disregard of duty; as, for example, in cases of collision and other wrongs done upon the high seas or elsewhere, within the admiralty and maritime jurisdiction, upon the general policy of that law which looks to the instrument itself, used as the means of the mischief, as the best and surest pledge for the compensation and indemnity to the injured party."

Another ancient principle may be expressed in the language of Fletcher Moneton, L. J. (1907) 1 K. B. 669:

> "A deviation is such a serious matter, and changes the charactar of the voyage so essentially, that a shipowner who has been guilty of a deviation cannot be considered as having

performed his part of the bill of lading contract, but something fundamentally different, and therefore he cannot claim the benefit of stipulations in his favor contained in the bill of lading."

(Quoted in Garver on Carriage of Goods by Sea, 6th Edition, Page 398.)

These general principles, well established and of ancient cognizance, should be kept in mind in a consideration of the statutes in a case like this. It is equally well established that when a governmental agency engages in a strictly private business (especially when, as here, it comes in competition with private persons) it loses many of its special privileges, and is to be regarded as far as possible as being subject to the same rules as such private [31] persons. (See Davoust vs. City of Alameda, 149 Cal. 70; Western Savings Fund Society vs. City of Philadelphia, 31 Pa. St. 183.)

Now in this case, a corporation formed under the laws of the District of Columbia for war purposes, was engaged in time of peace in the strictly merchant trade. It could not be claimed that the ship was performing any public function or any function to which the doctrine of public policy could attach. The stock of the company, it is true, is owned by the United States, and its functions, rights and liabilities, admittedly are largely a creation of Congressional enactment. But, in spite of that, it was doing, in the case of the "West Aleta," a strictly private business.

I take it that nothing in a material way is so

essential now, to the manifest destiny of this Republic as the healthy development of her foreign trade. It is a matter of common knowledge that production outruns the needs of our people in ever increasing ratio. Manufactures of every conceivable kind, raw materials, and the products of orchards and farm, must find foreign markets, if our progress is to continue. And the problem of how to find and how to keep those markets is to a considerable degree a problem of transportation. That we must be long dependent upon foreign bottoms for that transportation is unthinkable. In every way possible, therefore, American ships must be made attractive to American cargoes, and American cargoes made profitable for American ships. It would be but a poor means to that end, if the courts were to strain the statutes under which merchant vessels operated by an agency of the Government itself, should be held free of liability for the loss of goods entrusted to their care.

In a recent case (Director General of Railroads vs. Kastenbaum, No. 39, October Term, 1923, decided Nov. 12, 1923) [32] the Supreme Court had occasion to consider whether the Government could be held for damages for false imprisonment, for an arrest made on the demand of the detective force of a railroad while under federal control. The Court, speaking through the Chief Justice, quotes from Missouri vs. Ault, 256 U. S. 563, that "The Government undertook as carrier to observe all existing laws," and points out that the action for false imprisonment is "in the nature of a tres-

pass for a wrong or illegal act," and therefore holds the Government responsible.

So, throughout our judicial history, the tendency is to restrict, rather than to enlarge, the immunity of the Government from suit—to hold it more and more to the same liability as a private corporation, when it engages in a private business, in competition with private enterprise. That this is a sound development, no one would deny. That it should apply to admiralty, with peculiar force, seems to me in the very nature of things, to be apparent.

I am, therefore, constrained to hold that this is not a suit against the Government, nor does it come within Section 5 of the Suits in Admiralty Act. Moreover, I cannot conceive that it can be reasonably maintained that where a ship has gone to the bottom by virtue of a deviation, that the Court is without jurisdiction, because, by virtue of her own wrong, she is not physically within the United States.

The exceptions will therefore be overruled, with ten days to answer in each case.

[Endorsed]: Filed Dec. 26, 1923. [33]

[Title of Court and Cause.]

IN ADMIRALTY—No. 17,692.

ANSWER.

To the Honorable the Judges of the Southern Division of the United States District Court for the Northern District of California:

The answer of United States Shipping Board

Emergency Fleet Corporation, a corporation, respondent herein, in a cause of contract, civil and maritime, admits, denies and alleges, as follows:

I.

Answering unto Articles I and II of the first alleged cause of libel, respondent admits the allegations therein contained.

II.

Answering unto Article III in said first cause of libel, and particularly unto the allegation therein that on or about the 31st day of December, 1919, and the 6th day of January, 1920, Rosenberg Bros. & Co., a corporation, delivered in good order and condition at San Francisco, California, 1,500 sacks of rice for carriage by the steamer "West Aleta," as alleged therein, respondent [34] is ignorant so that it can neither deny nor admit the same, wherefore it calls for strict proof.

Said respondent denies that said 1,500 bags of rice, or any of them, were delivered in good order and/or condition aboard the steamer "West Aleta," but alleges that it was agreed, under the terms of the bill of lading, that said 1,500 bags of rice were shipped in apparent good order and condition on board the steamship "West Aleta," and not otherwise.

Respondent denies that said 1,500 bags of rice were to be transported, and/or delivered, in like good order and/or condition, as alleged in said article, but, in this behalf, admits that said 1,500 bags of rice were to be carried upon said steamer, and delivered at the port of Rotterdam, Holland, in accordance with the

terms and conditions of certain bills of lading issued for said shipment, and that, among other things, said bill of lading provided that said shipment was to be delivered in like apparent good order and condition as when shipped, unto the consignee named in said bill of lading at the port of Rotterdam, Holland.

III.

Answering unto Article IV of said first alleged cause of libel, respondent admits the issuance of its bills of lading on account of said shipments on the dates and for the quantities, as alleged in said articles, but, in this behalf, respondent refers to the original thereof which it prays that the libelant may be required to produce upon the trial.

IV.

Answering unto the allegations of Article V of said first cause of libel, respondent admits the same. [35]

V.

Answering unto Article VI of said first cause of libel, respondent admits that on or about the 8th day of January, 1920, said steamer "West Aleta" sailed from the port of San Francisco, and that at said time it had on board 1,500 sacks of rice, but denies that, pursuant to respondent's orders and/or directions, and/or otherwise, and/or at all, that said steamer deviated from the voyage alleged to have been agreed upon in said libel, and/or that it proceeded upon an entirely and/or different voyage to the port of Hamburg, Germany, but, in this behalf, respondent alleges that by and under the terms and

conditions of the bill of lading, it was agreed, among other things, that the carrier should have liberty "to touch at any port, or ports, in any rotation or order in or out of the customary route, and to call at any port or ports more than once."

Furthermore answering said article, respondent admits that the steamer "West Aleta" stranded upon Terschelling Island (in the North Sea) and thereupon became a total loss.

VI.

Answering unto Article VII of said first cause of libel, respondent denies that the said 1,500 sacks of rice were totally lost by reason of the alleged, and/or any, deviation of the steamer "West Aleta," but, in this behalf, respondent refers to the allegations contained herein wherein reference is made to the bills of lading providing that the carrier should have liberty "to touch at any port, or ports, in any rotation, or order, in or out of the customary route, and to call at any port, or ports, more than once." As to the remaining allegations in said article, respondent alleges that it has no knowledge or information sufficient to enable it to answer the same, so that it can neither admit nor deny said allegations, and therefore calls for strict [36] proof thereof.

VII.

Further answering said libel, and particularly the first alleged cause of libel, respondent alleges that at all the times in the libel mentioned, prior to said stranding, due diligence had been exercised to make said steamship "West Aleta" in all re-

spects seaworthy and properly manned, equipped and supplied, and said steamship was at all of said times in fact in all respects seaworthy and properly manned, equipped and supplied.

VIII.

Further answering said alleged cause of libel, and as a separate defense thereto, respondent alleges that, among other things, in and by the terms of said bills of lading, it was mutually agreed that the carrier should have liberty "to touch at any port, or ports, in any rotation or order in, or out of, the customary route and to call at any port, or ports, more than once," and, in this behalf, respondent alleges that at the time of the said stranding of the steamer "West Aleta" upon Terschelling Island, the said steamer was en route to the port of Hamburg, Germany, as a regular port of call under and by virtue of the terms of the bill of lading herein, and, as a further and separate defense, said bill of lading further provides, in part, as follows:

> "Clause 2. Also, that for loss or damage to or delay in delivery of goods of any description, whether carried in bulk or in packages, the carrier shall not be liable for, and the shipper shall not demand, any greater sum than One Hundred Dollars ($100.00) for each short ton of such of said goods as are lost or damaged or delayed (and/or for each fraction of one short ton lost or damaged or delayed as aforesaid such proportion of One Hundred Dollars ($100.00) as the weight of such fraction bears to one short ton) each short ton that is shipped

being represented and agreed by the shippers as being of [37] no greater value than One Hundred Dollars ($100.00) (and/or a proportionate amount of One Hundred Dollars ($100.00) for each additional fraction of one short ton or for each shipment of less than one short ton), unless a greater value is stated by the shipper and a bill of lading given and agreed therefor stating such greater value."

"Clause 3. Also, that if for any reason whatsoever the carrier shall be liable in a different or greater amount than set forth in paragraph two, then the carrier in respect of goods of any description shall not be liable for and the shipper shall not demand any greater sum than One Hundred Dollars ($100.00) for loss or damage to or delay in delivery of any one package, each package being represented and agreed by the shipper as being in no event of a greater value than One Hundred Dollars ($100.00) unless a greater value is stated by the shipper and a bill of lading given and agreed therefor stating such greater value."

"Clause 8. Also, that if the owner or operator shall have exercised due diligence to make the vessel in all respects seaworthy and to have her properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster, resulting *from faults or errors in navigation,* or in the management of the vessel, or from any latent defect in the vessel, her machinery or appurtenances,

or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent defect or the unseaworthiness was not discoverable by the exercise of due diligence), the shipper, consignees or owners of the cargo shall, nevertheless, pay salvage, and any special charges incurred in respect to the cargo, and shall contribute with the shipowner in General Average to the payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril, all with the same force and effect, and to the same extent as if such danger, damage or disaster had not resulted from or been occasioned by faults or errors in navigation, or in the management of the vessel, or any latent defect or unseaworthiness."

"Clause 10. Also, that in case the carrier is liable for loss or damage to any goods or merchandise under this bill of lading, the total amount recoverable shall in any event be restricted to the cash value of such goods at the port of departure at the time of shipment, the carrier reserving the option of replacing of repairing such goods at his expense, [38] and that all claims for partial loss or damage shall be ascertained and adjusted upon the same basis of value. No claim arising under this bill of lading is valid unless made in writing by consignees to carrier's agent at the port

of discharge, if for matters discoverable in all or in part without opening the package before removing the goods from the dock, or if for matters discoverable only by opening the packages, within ten days from the delivery thereof, or *if for nondelivery of the goods, within twenty days after the discharge of the vessel, or her departure from port of delivery.* No suit shall be commenced on any claim under this bill of lading after six months from the delivery of the goods to the consignee, or *if said claim is for nondelivery, after nine months from the receipt thereof by the carrier; in default of which making of such claim or filing of suit, such claim for loss or damage shall be deemed to be waived and the carrier discharged therefrom.*"

"Clause 11. Also, that any carrier or party liable on account of loss or damage to any of said property shall have the full benefit of any *insurance* that may have been effected upon or on account of said property, and the carrier may deduct from any claim hereunder the amount of any loan made by any insurer on the goods carried hereunder, to the shipper or owner of the cargo, which loan is made pending any claim for insurance on such goods."

"Clause 14. Also, that the carrier shall be liable only for loss of or damage to goods, all of which loss or damage is affirmatively shown and approved by the shipper to be solely due to the carrier's failure to use due diligence

properly to equip, man, provision and outfit said vessel and to make said vessel seaworthy and capable of performing her intended voyage or solely due to the carrier's negligence, fault or failure in proper loading, stowage, custody, care or proper delivery of said goods or merchandise."

IX.

Further answering unto said libel, and as a separate defense thereto, respondent alleges that any damage to, or loss of cargo was caused by one or more, and/or a combination of two or more risks and/or perils excepted in said bill of lading, and/or by the provisions of the Act of Congress of the United States, approved February 13, 1893, commonly known as the Harter Act. [39]

X.

Further answering said first cause of libel, respondent alleges that no value greater than $100.00 for each short ton, or a fraction thereof, was stated by the shipper, nor was there any agreement stating any greater value.

XI.

Further answering said first cause of libel, and as a separate defense thereto, respondent alleges that no claim was presented in writing within the time limited in Clause 10 of the bill of lading, nor was any suit commenced under the bill of lading, or in respect of said shipment of goods, within the time limited in Clause 10 of the bill of lading, under which said goods were shipped and that, by reason thereof, any claims under said bill of lading, or in

respect of said goods, were waived, and became barred, and the carrier was discharged therefrom.

XII.

Further answering said alleged first cause of libel, respondent alleges that said 1,500 bags of rice were insured, and respondent claims the benefit thereof, and claims a deduction from any claim herein to the amount of any payment or loan made in respect to said shipment of rice.

XIII.

Further answering unto said first alleged cause of libel, respondent hereby refers to the bills of lading under which said goods were shipped, and prays that the libelant be compelled to produce the same at trial, and refers to each and all of the terms and conditions of said bills of lading, as though said bills of lading were attached hereto, and made a part hereof. [40]

XIV.

Further answering said alleged first cause of libel, and as a separate defense thereto, respondent alleges that it did not agree to carry said 1,500 bags of rice on any particular route, and/or to any port of call in any particular order and, in this behalf, alleges that by the terms of the bill of lading covering said shipment herein, it is expressly agreed that the carrier is to have "leave to touch at any port or ports, in any rotation or order in or out of the customary route."

SECOND CAUSE OF LIBEL.

I.

Answering unto Articles I and II of the second

alleged cause of libel, respondent admits the allegations therein contained.

II.

Answering unto Article III of the second cause of libel, and particularly unto the allegation therein that on or about the 15th day of December, 1919, Rosenberg Bros. & Co., a corporation, libelant herein, delivered in good order and condition at San Francisco, California, 4,000 sacks of rice for carriage by the steamer "Cockaponset," as alleged therein, respondent is ignorant so that it can neither deny nor admit the same, wherefore it calls for strict proof thereof, if relevant.

Said respondent denies that the said 4,000 bags of rice, or any of them, were delivered in good order and/or condition aboard the steamer "Cockaponset," but allege that it was agreed, under the terms of the bill of lading, that the said 4,000 bags of rice were shipped in apparent good order and condition on board the steamship "Cockaponset," and not otherwise.

Respondent denies that said 4,000 bags of rice were to be transported and/or delivered in like good order and/or condition as alleged in said article, but, in this behalf, admits that said [41] 4,000 bags of rice were to be carried upon said steamer and delivered at the port of Rotterdam, Holland, in accordance with the terms and conditions of certain bills of lading issued for said shipment and that, among other things, said bill of lading provided that said shipment was to be delivered in like apparent good order and condition

as when shipped, unto the consignee named in said bill of lading at the port of Rotterdam, Holland, and, further, said bill of lading provided that the said 4,000 bags of rice were to be transported by the steamer "Cockaponset" "to be carried upon said vessel, or any other vessel, operated by or on account of the United States Shipping Board Emergency Fleet Corporation or the United States Shipping Board."

III.

Answering unto Article IV of the said second alleged cause of libel, respondent admits the issuance of its bills of lading on account of the said shipments on the dates and for the quantities alleged in said article, but, in this behalf, respondent refers to the said original bills of lading and demands that the libelant be required to produce said bills of lading upon the trial.

IV.

Answering unto the allegations of Article V of the said second alleged cause of libel, respondent admits the same.

V.

Answering unto Article VI of the said second alleged cause of libel, respondent denies that it neglected, and/or wrongfully neglected, to ship 680 of the said 4,000 sacks of rice by the steamer "Cockaponset" but, in this behalf, admits that 680 sacks of said 4,000 sacks of rice were shipped upon the steamer "West Aleta," in accordance with the terms and conditions of certain bills of lading issued for the said shipment and that, among other things,

said bills of lading provided that the said rice [42] was to be transported by the steamer "Cockaponset" "to be carried upon said vessel, or any other vessel, operated by or on account of the United States Shipping Board Emergency Fleet Corporation or the United States Shipping Board."

Respondent admits that said steamer "Cockaponset" sailed from the port of San Francisco without having on board 680 sacks of the 4,000 sacks of rice.

Respondent admits that thereafter it placed the 680 sacks of rice aboard the steamer "West Aleta" for shipment to the said port of Rotterdam, Holland, which said steamer "West Aleta" was then and there being operated by or on account of the United States Shipping Board Emergency Fleet Corporation or the United States Shipping Board.

VI.

Answering unto Article VII of the said second alleged cause of libel, respondent admits that on or about the 6th day of January, 1920, the said steamer "West Aleta" having on board the said 680 sacks of rice sailed from the port of San Francisco, California, but denies that pursuant to respondent's order, and/or directions, and/or otherwise, and/or at all, that the said steamer "West Aleta" deviated from the voyage alleged to have been agreed upon in said libel, and/or that it proceeded upon an entirely and/or different voyage to the port of Hamburg, Germany, but, in this behalf, respondent alleges that by and under the terms and conditions of the bill of lading it was

agreed, among other things, that the carrier should have liberty, "to touch at any port, or ports, in any rotation, or order, in or out of the customary route, and to call at any port, or ports, more than once."

Further answering said article, respondent admits that the steamer "West Aleta" stranded upon Terschelling Island (in the North Sea) and thereupon became a total loss. [43]

VII.

Answering unto Article VIII of the said second alleged cause of libel, respondent denies that the said 680 sacks of rice were totally lost by reason of the alleged, and or any, deviation of the steamer "West Aleta," but, in this behalf, respondent refers to the allegations contained herein wherein reference is made to the bills of lading providing that the carrier should have liberty "to touch at any port, or ports, in any rotation, or order, in or out of the customary route, and to call at any port, or ports, more than once."

As to the remaining allegations in said article, respondent alleges that it has no knowledge or information sufficient to enable it to answer the same, so that it can neither admit nor deny said allegations, and calls for strict proof thereof, if relevant.

VIII.

Further answering unto the said second alleged cause of libel, and as further and separate defenses thereto, respondent herein repeats and hereby makes a part of this answer, as fully as if set forth at length herein, all of the allegations of

Articles VII, VIII, IX, X, XI, and XIII of the answer to the first alleged cause of libel herein.

IX.

Further answering said alleged second cause of libel, respondent alleges that the said 680 sacks of rice were insured and respondent claims the benefit thereof and such deduction from any claim herein as is equal to the amount of any payment or loan made in respect of said shipment of rice by reason of any such insurance. [44]

X.

Further answering said alleged second cause of libel, and as a separate defense thereto, respondent alleges that it did not agree to carry said 680 bags of rice on any particular route and/or to any port of call in any particular order, and in this behalf, alleges that by the terms of the bill of lading covering said shipment herein, it is expressly agreed that the carrier is to have "leave to touch at any port, or ports, in any rotation or order or out of the customary route."

WHEREFORE respondent prays that said libel may be dismissed, and for its costs herein.

IRA S. LILLICK,
Proctor for Respondent. [45]

In the Northern District of the State of California, City and County of San Francisco,—ss.

F. W. Relyea, being first duly sworn deposes and says:

That he is an officer, to wit, the District Director of the United States Shipping Board Emergency Fleet Corporation, a corporation, Respondent

herein, and as such, is authorized to make this verification; that he has read the foregoing Answer to the Libel herein and knows the contents thereof and that the same is true of his own knowledge, except as to those matters which are therein stated on information and belief, and that as to those matters he believes it to be true.

F. W. RELYEA.

Subscribed and sworn to before me this 4th day of February, 1924.

[Seal] M. V. COLLINS,

Notary Public in and for the City and County of San Francisco, State of California. [46]

[Title of Court and Cause.]

IN ADMIRALTY.—No. 17,692.

ANSWERS TO INTERROGATORIES PROPOUNDED BY LIBELANT TO RESPONDENT.

Answer to Interrogatory No. 1: Yes.
Answer to Interrogatory No. 2: Attached.
Answer to Interrogatory No. 3: No.
Answer to Interrogatory No. 4: None given.
Answer to Interrogatory No. 5: No.
Answer to Interrogatory No. 6: None.
Answer to Interrogatory No. 7: No.
Answer to Interrogatory No. 8: None.
Answer to Interrogatory No. 9: No.
Answer to Interrogatory No. 10: None.

Answer to Interrogatory No. 11: Balboa, Canal Zone.

Answer to Interrogatory No. 12: Hamburg, Germany.

IRA S. LILLICK,
Proctor for Respondent. [47]

January 3rd, 1920.

George H. Ewart, Master
SS. "West Aleta,"
San Francisco.

Dear Sir:

SAILING ORDERS.

1. SAILING. Immediately upon your command's readiness for sea, and after all Customs formalities have been complied with, you will proceed on your voyage, via the Panama Canal, and the most direct and safest route to Hamburg, Germany, which will be your first port of discharge. After discharging, your Hamburg cargo, you will proceed to Rotterdam, Holland, to discharge the cargo you have for that port, and thence to Cardiff, England, your last port of call, where you will discharge your cargo for that port.

2. GENERAL: As Managers and Operators, you will consider us as Managers in the light of Owners, and as Operators in the light of Time Charterers. In so doing it should facilitate the keeping of your accounts as they apply to Managers or to Operators. In the keeping of your accounts on this voyage, you will keep your records separate as to such items as are for owners' account, and

such as would ordinarily be for time charterers' or Operators' account.

3. PANAMA CANAL: Approach the Balboa entrance to the Panama Canal, cautiously, until you are boarded by a Pilot. The International Banking Corporation, Ancon, Canal Zone, will act as our representatives at the Panama Canal, and all arrangements for supplies, etc., except fuel oil bunkers, or ship repairs, should be made by you through the Captain of the Fort of Balboa. All expenses at the Panama Canal, including Canal Tolls, will be paid by the International Banking Corporation. You will communicate with them promptly upon your arrival at the Panama Canal.

The Panama Agencies Company at Balboa and Cristobal are Agents for the United States Shipping Board. They are authorized to represent the Construction and Repair Department and will arrange for any necessary repairs. You should make every effort, according to instructions from the United States Shipping Board, even at higher consumption, to reach the terminal port before 10:00 A. M. in order that you may transit the Canal on the day of arrival. When forty-eight hours from Balboa, you should radio the Panama Agencies Company the expected hour and day of arrival, bunker requirements, and list of repairs, if any, in order to facilitate despatch as [48] much as possible.

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A representative of the Panama Agencies Company will meet all vessels between sunrise and sunset. Their cable address is 'U. S. Shipboard Panama."

This radiogram should also instruct them to advise the International Banking Corporation as to your expected arrival.

We understand the United States Government regulations at the Canal are such that if your vessel arrives at Balboa before 2:30 P. M., you cannot transit the Canal the same day.

The United States Shipping Board state that vessels sailing from this Coast through the Panama Canal may proceed inside breakwater at Cristobal and they will be received up to 10:00 P. M. Rules and regulations for the operation and navigation of the Panama Canal, Paragraph No. 40, reads:

> "As soon as radio communication can be established with the Canal, vessels should report their name, nationality, length, draft, tonnage, whether or not they desire to pass through the Canal, require bunkers, provisions, supplies, repairs, to go alongside a wharf, the use of tugs, probable time of arrival, length of stay in port, and any other matters of importance or of interest. If this information has been previously communicated through Agents, or otherwise, to the Captain of the Port, it will not be necessary to report by radio, but the probable time of arrival should always be sent."

4. FUEL OIL BUNKERS: The Pan-American Petroleum and Transportation Company will furnish you with all fuel oil bunkers at the Canal, the United States Shipping Board having contracted with them to supply all fuel oil at that port.

Upon sailing from San Francisco you will have sufficient fuel oil bunkers to take you to the Panama Canal.

At the Canal it will be necessary for you to fill all your double bottoms, deep tank, settling tank, after peak and fore peak, the capacity of which, we believe, is about 13,113 barrels. In other words, you are expected to have sufficient fuel oil bunkers when sailing from the Canal to cover your entire voyage, including all lay days, and your return to a United States Atlantic port.

Together with the Chief Engineer, you will sign the customary receipts for the amount of fuel oil taken, paying for which having been arranged by the United States Shipping Board.

5. SUPPLIES AND REPAIRS, BILLS AND RECEIPTS: Written requisitions for absolute necessities are always to be given Agents for attention. Written orders for such supplies as you will need at the Canal should be ready to hand to the representative [49] of the Captain of the Port

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when your vessel is boarded at Balboa. All bills of any character must be in quarduplicate, approved by you as Master and must show clearly that the goods were supplied or service performed, and be duly receipted. All bills for Fuel and Water must also be signed by the Chief Engineer. Bills for repairs will be handled by you in accordance with the regulations of the Panama Agencies Company.

We have furnished your vessel with sufficient dry stores for a one hundred and twenty-five days voy-

age; therefore, your purchase of additional supplies at the Canal should be confined strictly to perishables, and we would ask that you keep other purchases of supplies down to a minimum.

The United States Shipping Board instruct that no repairs, the cost of which will exceed in amount Fifty pounds Sterling, are to be undertaken at United Kingdom ports, without first consulting with the representative of the United States Shipping Board, No. 8 Grosvenor Garden, London, England, whose cable address is "AMSHIBO, LONDON."

6. FUEL AND WATER: On the voyage you will please give personal attention and in co-operation with the Chief Engineer, see that your supply of fuel and water are at all times sufficient for the voyage.

7. SAFE NAVIGATION: You will at all times use every precaution for safe navigation, safety of ship and cargo being of first importance. Your vessel is not insured. In ports, use every precaution to safeguard your vessel and cargo, placing such regular and extra watch as you think advisable.

8. OFFICERS AND CREW: Should it become necessary to replace any of your officers or crew, you will apply to the United States Sea Service Bureau for such men as you may require, sending this office the names, addresses, records, ratings, etc., of the men secured. At ports where this Bureau is not represented, you will, of course, recruit such men as you need through the usual channels.

9. EQUIPMENT AND STORES: There is on board your vessel for each Department, a form of Inventory covering all consumable stores and equipment on board. At the termination of each round voyage you are to turn in to our office (or in the event of the vessel being turned over to other Managers at outside ports, to our Agents in that port), a complete Inventory of stores and equipment in each department. We would direct your particular attention to the importance of seeing that this report is complete in every detail. Inventory books for all Departments have been furnished the vessel.

10. LOGS: Your vessel has been furnished with

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[50] United States Shipping Board forms of "Abstract Deck Logs" and "Abstract Engineers Log." The United States Shipping Board emphasize the necessity and importance of Masters and Chief Engineers forwarding through this office, three copies, properly filled out for each voyage. Vessels sailing from the Pacific Coast, via the Panama Canal, to Europe, should forward *prior* to departure from the last port of call at the Canal for Europe, one copy of "Abstract Deck Log" and one copy of "Abstract Engineers Log" to the Division of Operations, United States Shipping Board, Washington D. C., and two copies of each to our San Francisco office, upon arrival at your first European port of call, and this method should be followed for each leg of your voyage in case you make more than one port, either outward or home-

ward. The importance of those instructions should not be overlooked.

11. FRESH WATER: The United States Shipping Board state that all their steel steamers of 8800 tons dead weight, and upward, are to be supplied with Fresh Water not to exceed an average of 10 tons for each average running day. No exceptions are to be made to this rule, without the approval of the Port Engineer of the Division of Operations, United States Shipping Board, whose opinion on such matters should be solicited freely.

12. SLOP CHEST: In accordance with the law there is aboard your vessel a Slop Chest which is fully detailed in the list of slop equipment account placed on board by us. You have been furnished with copies of invoices covering the various articles included. You are held personally responsible for the Slop Chest and on the completion of each voyage a separate inventory in triplicate, showing the number of articles and total cost must be submitted to our office, or to our Agents at the port at which vessel may complete the voyage, in which case the report will be turned in to them, with a copy to us.

According to the law, charges for articles sold from the Slop Chest must be at a price not to exceed 10% of the cost price.

13. ACCOUNTS: One of the most important items is that of rendering complete and intelligent accounts, not only of the vessel's operations, but in connection with the detailed accounts covering the vessel's supplies and equipment, and proper forms

for rendering the accounts are on board your vessel. You should therefore, make it a point to see that all the forms are kept up to date and intelligently filled out so there will be no confusion when the vessel is turned over to the United States Shipping Board, or others, when our Management terminates.

Kindly be particularly careful in the rendering of all your accounts. [51]

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Pay Rolls which include items for overtime must be accompanied by the form showing in detail what overtime was worked and in what departments.

Any bills for repairs must show the nature of the work done. This applies not only to the work ordered by yourself, but where work is done by Agents, in the latter event being sure that bills are properly approved by yourself and the head of the Department of your ship interested.

The Government is very exacting in requiring supporting vouchers for expenditures, and we, therefore, depend upon you to see that their requirements are fully made. Four receipted bills must be rendered for all expenditures and these receipted bills must be sent to us with accounts, either through our Agents or by you direct.

Requisite forms for making up the various reports are in the hands of your Chief Officer, Chief Engineer and Steward, and if they are filled up to date, there should be no difficulty in keeping all records clear and shipshape.

14. MINE WARNINGS: Necessary instructions for safe passage through the areas which have been mined during the War are being distributed by the Hydrographic office of the Navy Department. It is very important that Masters of United States Shipping Board vessels have the latest possible information.

Before sailing from the Panama Canal, you should interview the Hydrographic Officer at the Canal and secure the latest information in his possession.

For your information, the following report was recently received from the Shipping Board at Washington:

> "Regret that American Masters continue to arrive here without warning of any kind from American authorities regarding mine fields off Gothenberg. Loss of Shipping Board vessel Lake Placid on May 19th may be charged to incomplete information furnished to Masters in United States and unless this deplorable condition is not immediately remedied, more ships and lives will be lost in these waters.
>
> American SS. Winding Gulf arrived here yesterday (June 22nd, 1919) after miraculous passage through Cattegat mine belts. Respectfully recommend wireless warnings be sent broadcast immediately. British mariners fully informed and alive to dangers. Telegraphed Skaw Light ship and light House to-day to warn all American ships."

For your information and guidance, we enclose

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[52] herewith copy of circular letter, Bulletin No. 27, issued by the United States Shipping Board, Washington, under date of December 18th, 1919. Kindly give same your careful attention.

15. LONDON REPRESENTATIVE OF UNITED STATES SHIPPING BOARD: Mr. H. T. Morse, is the Special Representative of the United States Shipping Board, Division of Operations, at London. We enclose copy of instructions issued by the United States Shipping Board, Washington, covering wireless advices which must be followed.

16. FUEL OIL BUNKERS IN EUROPE: As above stated, upon leaving the Canal you are supposed to have sufficient oil bunkers for your entire voyage and to bring you back to a United States Atlantic port. However, in case your bunkers are short, you will immediately communicate with Mr. H. T. Morse, Special representative of the United States Shipping Board, London, for bunkering instructions.

17. PASSENGERS: No passengers are to be carried upon your vessel, except upon authority from proper United States Shipping Board officials, or upon instructions from this office.

18. BILL OF HEALTH: Masters are particularly cautioned to secure necessary Bill of Health before sailing from European ports to United States ports. The United States authorities hold Masters personally responsible for this detail.

19. CIRCULAR LETTER No. 85, PILOTS, TUGS, ETC., IN EUROPE: For your information and guidance, we enclose copy of circular letter No. 85, issued by the United States Shipping Board, San Francisco, April 30th, 1919.

The information and suggestions contained therein should be quite valuable to you, and we are confident that you will handle such details to our satisfaction.

20. CIRCULAR LETTER No. 59, CREWS: For your information and guidance, we enclose a copy of the above-numbered circular letter, issued by the United States Shipping Board, San Francisco, February 7th, 1919.

21. CIRCULAR LETTER No. 125, RADIO: For your information and guidance, we enclose copy of Circular Letter No. 125, issued by the United States Shipping Board, San Francisco, August 9th, 1919, which we trust will receive your careful attention.

22. GENERAL ORDER No. 28: For your information and guidance, we enclose herewith copy of General Order No. 28, issued by the United States Shipping Board, Washington, September 5th, 1919, which we trust will receive your careful attention. [53]

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23. CIRCULAR LETTER No. 167: For your information and guidance, we enclose herewith copy of Circular Letter No. 167, issued by the United States Shipping Board, San Francisco, December 12th, 1919, relative to Radio Communication Laws

of the United States, which we trust will receive your attention.

24. BULLETIN No. 23: For your information, we are in receipt of the following Bulletin No. 23, issued by the United States Shipping Board, Washington, December 3rd, 1919, addressed to District Officers, Managers and Masters of Shipping Board vessels, under the subject, "Indicating Foreign Exchange Rates in Ships Log":

> "It has been observed that numerous disputes have arisen as to the rate at which Masters have paid members of crews in foreign countries where the rate of exchange is continually fluctuating.
>
> Such disputes may be avoided if Managers of Shipping Board vessels will have the Masters enter on the ship's Log the rate of exchange at which he received his funds and see that crews are paid at such rate."

25. GENERAL ORDER No. 48, DISCIPLINE: For your information and guidance, we enclose herewith copy of General Order, as above, issued by the United States Shipping Board, Washington, November 25th, 1919, which we trust will receive your very careful attention.

26. GENERAL ORDER No. 47, DISCIPLINE: For your information and guidance, we enclose herewith copy of General Order, as above, issued by the United States Shipping Board, Washington, November 25th, 1919, which we trust you will give your careful attention.

27. CIRCULAR LETTER No. 165: For your information and guidance, we quote herewith Circular letter, as above, issued by the United States Shipping Board, San Francisco, December 2nd, 1919:

> "Please instruct Masters of all vessels leaving the port of San Francisco, under your jurisdiction to report daily by wireless, as long as they can keep in touch, their daily fuel consumption, speed, distance run and revolutions per minute of main engines.
>
> This information is considered essential for keeping track of vessels' performances."

Kindly see that these instructions are given your careful attention.

28. BULLETIN No. 24, STOWAWAYS: For your information and careful attention, we enclose herewith copy of the above [54] Bulletin, issued

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by the United States Shipping Board, Washington, December 2nd, 1919.

29. CIRCULAR LETTER No. 168: For your information and careful attention, we enclose herewith copy of the above circular, issued by the United States Shipping Board, San Francisco, December 5th, 1919.

30. SUPERCARGOES: We enclose herewith copy of letter which we have received from the United States Shipping Board, Washington, December 1st, under the above subject, the contents of which we commend to your interest and attention.

31. IMMIGRATION SERVICE: For your information and guidance, we enclose herewith copy of letter from above office, dated September 23rd, 1919, the contents of which we commend to your interest and careful attention.

32. WIRELESS AND CABLE ADVICES: You will wireless this office from time to time, advising progress being made by your vessel between here and the Panama Canal. These reports should give the following information: Name of steamer, hour and date and distance from San Francisco. For example—"West Aleta, 8 pm, 7th, 100 miles south San Francisco."

It will not be necessary for you to give your location unless conditions should develop whereby you are obliged to deviate from your usual course.

As soon as you are in radio touch with Germany, you will kindly keep our Agent, Mr. Henry McDornan, Hamburg, advised of your position, giving him, as soon as possible, the date and hour of your expected arrival at Hamburg.

Owing to conditions developing on account of the many floating mines in the English Channel, also off the Coast of Belgium and Holland, you will, as soon as you are in wireless touch with the United Kingdom, wireless our General European Agent, Mr. W. W. Thurston, London, giving him your position, and ask for further instructions regarding pilots, etc., and you will be governed by instructions you will receive in your passage through the Channel from Mr. W. W. Thurston, or from Mr. Tobey of the United States Shipping Board at London.

Mr. Henry McDornan will furnish you with necessary sailing orders and instructions upon your departure from Hamburg, for your next port of call.

You will also radio Mr. W. W. Thurston, our General European Agent, London, and also to Mr. H. T. Morse, Special Representative of the United States Shipping Board, London, your position, giving them, as soon as possible, your date and hour of expected arrival at your European ports of call. [55]

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You will also cable us promptly, date and hour of your arrival at and departure from the Panama Canal, and any other important information, which in your opinion we should have. This is very important.

33. HOMEWARD VOYAGE: Your homeward voyage will depend upon conditions which may develop after your arrival in Europe and you will receive instructions from either Mr. H. T. Morse, above referred to, Mr. W. W. Thurston, also referred to above, or cable instructions from the proper Officials of the United States Shipping Board, or cable instructions from us.

In case your vessel returns to a United States Atlantic port in ballast, and your management and operation has not been cancelled, you will wireless forty-eight hours before your arrival at such port, the expected hour and date of your arrival, to Williams, Dimond and Company, No. 8 Bridge Street, New York City, to whom you will report,

and to the United States Shipping Board, New York and Washington.

34. UNUSUAL CONDITIONS: In case any unusual conditions develop on your voyage, and you feel that you require instructions, do not hesitate to get into communication with the nearest United States Shipping Board officials, or our Agents.

35. SUPERCARGO: The Supercargo is placed aboard your vessel under special instructions from the United States Shipping Board. He is subject to our direction in regard to his work aboard this vessel, and we will give him necessary instructions in regard to handling such documents as are necessary, including receipt and delivery of cargo, loading and discharging, and he is to give any assistance within his power to assist in expediting the dispatch of this steamer.

A letter of instructions is being handed to the Supercargo, a copy of which will be handed to you under separate cover.

Foreign Agents are to make no payment whatever to the Supercargo on account of salary or expenses.

36. WIRELESS AND CABLE ADDRESSES:

KAIMANA—Williams, Dimond & Co., San Francisco and New York.

PANCANAL, PANAMA—Officials of the Canal at Panama.

USSHIPBOARD—United States Shipping Board, New York, Washington, and any other United States port.

MORSE, SHIP MISSION, LONDON—H. T. Morse, Special representative of the U. S. Shipping Board, London, England. [56]

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AKKAIMANAL—Mr. W. W. Thurston, Williams, Dimond and Company's General European Agent, 2 Fenchurch Ave., London, E. C. 3, England.

NANRODCAM—Mr. Henry McDornan, Williams, Dimond and Company's representative, 28 Bergstrasse, Hamburg, Germany.

VANOMMEREN—Ph. van Ommeren, Williams, Dimond and Company's representative, Rotterdam, Holland.

NONERAIL—Mr. E. H. Mundy, Williams, Dimond and Company's Agent General for the United Kingdom, No. 2, Fenchurch Ave., London, E. C. 3, England.

Wishing you a safe, speedy and pleasant voyage, we remain,

Yours faithfully,

Enclosures. [57]

In the Northern District of the State of California, City and County of San Francisco,—ss.

F. W. Relyea, being first duly sworn, deposes and says:

That he is an officer, to wit, the District Director of the United States Shipping Board Emergency Fleet Corporation, a corporation, respondent herein, and as such, is authorized to make this verification; that he has read the foregoing answers to interroga-

tories propounded by libelant to respondent herein and knows the contents thereof and that the same are true of his own knowledge, except as to those matters which are therein stated on information and belief, and that as to those matters he believes it to be true.

F. W. RELYEA.

Subscribed and sworn to before me this 4th day of February, 1924.

[Seal] M. V. COLLINS,

Notary Public in and for the City and County of San Francisco, State of California. [58]

INTERROGATORIES DIRECTED TO LIBELANT, TO BE ANSWERED BY IT UNDER OATH.

Interrogatory No. 1. Was any insurance carried upon the said 1,500 bags of rice, and/or the said 680 bags of rice, or any part thereof, herein?

Interrogatory No. 2. If so, attach copy of insurance policy.

Interrogatory No. 3. Has any insurance been paid on account of the loss, and/or damage, to the said 1,500 bags of rice, and/or the said 680 bags of rice, herein?

Interrogatory No. 4. If so, how much and to whom have said payments been made?

Interrogatory No. 5. Has any loan been made on account of the loss, and/or damage, to the said 1,500 bags of rice, and/or the said 680 bags of rice, herein?

Interrogatory No. 6. If so, how much and to whom have the said loans been made?

IRA S. LILLICK,
Proctor for Respondent.

Due service and receipt of the within answer is hereby admitted this 4th day of February, 1924.

J. M. MANNON, Jr.,
FARNHAM P. GRIFFITHS,
McCUTCHEN, OLNEY, MANNON & GREENE,
Proctors for Libelant.

[Endorsed]: Filed Feb. 4, 1924. [59]

[Title of Court and Cause.]

IN ADMIRALTY—No. 17,692.

ANSWERS TO INTERROGATORIES PROPOUNDED BY RESPONDENT TO LIBELANT.

Now comes libelant above named, and answering the interrogatories propounded by respondent, makes the following replies:

Answer to Interrogatory No. 1: Yes, insurance was carried upon said Fifteen Hundred (1500) bags of rice and said Six Hundred and Eighty (680) bags of rice.

Answer to Interrogatory No. 2: Said insurance was covered by Certificates 688922, 692623, 692640, 692641 dated respectively December 17, 1919, December 15, 1919, December 31, 1919 and December 31,

1919, all issued by Fireman's Fund Insurance Company. Said certificates were in the usual form employed by said Insurance Company and covered the usual risks. Libelant offers to permit respondent to inspect the said original certificates at any time upon request.

Answer to Interrogatory No. 3: Yes. [60]

Answer to Interrogatory No. 4: Four Thousand Nine Hundred Thirty-nine and Twenty Hundredths ($4,939.20) Dollars, covering Six Hundred and Eighty (680) bags of rice, paid to libelant, and Fifteen Thousand Eight Hundred Forty-three and Fitty-nine Hundredths ($15,842.59) Dollars covering Fifteen Hundred (1500) bags of rice paid to William Schall & Company on behalf of Schlubach, Behrens & Company of the Hague, Holland.

Answer to Interrogatory No. 5: No.

Answer to Interrogatory No. 6: None.

J. M. MANNON, Jr.,
FARNHAM P. GRIFFITHS,
McCUTCHEN, OLNEY, MANNON & GREENE,
Proctors for Libelant. [61]

State of California,
City and County of San Francisco,—ss.

R. S. Geen, being first duly sworn, deposes and says:

That he is an officer, to wit, the secretary of Rosenberg Bros. & Co., a corporation, libelant in the above-entitled cause, and makes this verification for and on behalf of the libelant for the reason that

it is a corporation, as aforesaid; that he has read the foregoing answers to interrogatories propounded by respondent to libelant herein and know the contents thereof, and that the same are true of his own knowledge, except as to those matters which are therein stated on information and belief, and that as to those matters he believes it to be true.

R. S. GEEN.

Subscribed and sworn to before me this 5th day of June, 1924.

[Seal] JAMES MASON,

Notary Public in and for the City and County of San Francisco, State of California.

Service of the within answers to interrogatories and receipt of a copy is hereby admitted this 16 day of June, 1924.

I. S. LILLICK,
Proctor for Respondents.

[Endorsed]: Filed Jun. 17, 1924. [62]

[Title of Court and Cause.]

IN ADMIRALTY—No. 17,692.

AGREED STATEMENT OF FACTS.

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above-entitled cause that the following facts are true and that said facts shall be deemed proved at any trial or trials of said cause without the necessity of any evidence other than this stipulation, to wit:

(1) That libelant heretofore and, to wit, on or about between the thirty-first day of December, 1919, and the sixth day of January, 1920, delivered in good order and condition at San Francisco, California, to respondent fifteen hundred (1500) sacks of rice for carriage, by the steamer "West Aleta" as a common carrier of merchandise by sea, upon a voyage to Rotterdam, Holland, and deliverey there in like good order and condition unto the order of said libelant. That respondent duly received said fifteen hundred (1500) sacks of rice on board said steamer as such common carrier of merchandise by sea and agreed to carry [63] the same by said steamer to Rotterdam, Holland, and there to deliver said rice as aforesaid.

(2) That libelant heretofore and, to wit, on or about the fifteenth day of December, 1919, delivered in good order and condition at San Francisco, California, to respondent four thousand (4,000) sacks of rice, for carriage by the steamer "Cockaponset," as a common carrier of merchandise by sea, upon a voyage to Rotterdam, Holland, and delivered there in like good order and condition unto the order of said libelant; that respondent duly received said four thousand (4,000) sacks of rice and agreed to carry the same by said steamer to Rotterdam, Holland, and there to deliver said rice as aforesaid.

(3) That respondent failed to carry six hundred eighty (680) of said four thousand (4,000) sacks of rice by said steamer "Cockaponset" and said vessel sailed from San Francisco without having on board said six hundred eighty (680) sacks of rice.

That thereafter respondent placed said six hundred eighty (680) sacks of rice aboard the said steamer "West Aleta" for shipment to said port of Rotterdam, Holland.

(4) That at the times herein mentioned the steamer "West Aleta" was owned by the United States of America and was documented in the name of the "United States represented by United States Shipping Board." Prior to the times mentioned in the libel the respondent entered into contracts with Messrs. Williams Dimond & Company for the management and operation of said steamship, copies of which managing agreement and operating agreement are hereunto annexed and marked, respectively, Exhibit "A" and Exhibit "B." [64] During all the times mentioned in the libel said steamship was operated and managed under said agreements.

(5) That the bills of lading issued with respect to the carriage of the rice described in paragraph (1) hereof were all in the form of Exhibit "C" attached hereto, except as to date, quantity, description of goods and freight charges, and this shall be deemed sufficient showing of all of said bills of lading as requested by respondent.

(6) That the bill of lading issued with respect to the carriage of the rice described in paragraphs (2) and (3) hereof was in the form of Exhibit "D" hereto attached, and this shall be deemed sufficient showing of said bill of lading as requested by respondent.

(7) That the steamship "West Aleta" loaded and

carried approximately two thousand six hundred thirty-four (2,634) tons of cargo destined for Cardiff, Wales, one thousand five hundred three (1,503) tons of cargo destined for Rotterdam, Holland, and six hundred sixty-one (661) tons of general merchandise destined for Hamburg, Germany. Said Cardiff and Rotterdam cargo was chiefly barrels of wine, brandy and oil, and said cargo was in the main stowed in the lower holds and the Hamburg cargo was principally stowed on top of said Cardiff and Rotterdam cargo. Said stowage was prudent.

(8) That at all of the material times herein due diligence was exercised to make the steamship "West Aleta" in all respects seaworthy and properly manned, equipped and supplied. [65]

(9) That from December fourth, 1919, to January sixth, 1920, inclusive, an advertisement, a copy of which is hereto annexed, marked Exhibit "E," and hereby made a part hereof, appeared daily in the "Daily Commercial News of San Francisco," and on and between the same dates, inclusive, an advertisement, a copy of which is hereto annexed, marked Exhibit "F" and hereby made a part hereof, appeared daily in "The Guide," a leading commercial paper of San Francisco.

(10) That no greater value than that mentioned in Clause 2 and/or Clause 3 of the said bill of lading was stated by the shippers, nor was any bill of lading given and agreed therefor stating a greater value.

(11) That the steamship "West Aleta" sailed from San Francisco, California, on January sixth, 1920, having on board all the rice described in paragraphs (1) and (3) hereof. That in accordance with orders issued to the master, the vessel proceeded by the direct route from the Pacific Coast to the port of Hamburg via the Panama Canal. The course of the vessel and the circumstances of stranding are shown in a copy of the master's extended protest hereto attached, marked Exhibit "G" and hereby made a part hereof. That on the twelfth day of February, 1920, at approximately two-twenty-eight o'clock A. M., the said vessel stranded and was wrecked on Terschelling Island in the North Sea, and, with all her cargo, she became a total loss. All the rice described in paragraphs (1) and (3) hereof was totally destroyed as a result of the stranding and wreck of said steamship as aforesaid. [66]

(12) That the only ground upon which libelant asserts claim against respondent is upon the ground of improper deviation.

(13) If instead of proceeding toward Hamburg as her first port of call the steamer "West Aleta" had put into Rotterdam as her first port of call, she would have arrived at Rotterdam on or about the eleventh day of February, 1920. If instead of proceeding toward Hamburg as her first port of call the steamer "West Aleta" had put into Cardiff, Wales, as her first port of call and there discharged cargo and then proceeded to the port of Rotterdam as her second port of

call, she would have arrived at Rotterdam on or about the fifteenth day of February, 1920. The market value of the rice described in paragraphs (1) and (3) hereof at Rotterdam, Holland, on or about the eleventh day of February, 1920, and on or about the fifteenth day of February, 1920, was the sum of twenty thousand seven hundred eighty-two and seventy-nine hundredths (20,782.79) dollars.

(14) That no claims in writing with respect to the matters involved herein were made, nor was this libel filed within nine (9) months after respondent received the goods described in paragraphs (1) and (3) hereof.

(15) That in stipulating the facts herein the respective parties do not concede the relevancy or materiality of any fact so stipulated.

(16) That either party may offer evidence upon matters deemed pertinent and not covered by this stipulation.

Dated: San Francisco, California, November 19th, 1924.

J. M. MANNON, Jr.,
FARNHAM P. GRIFFITHS,
McCUTCHEN, OLNEY, MANNON & GREENE,
Proctors for Libelant.
IRA S. LILLICK,
Proctor for Respondent. [67]

EXHIBIT "A."

Form 7045 D. of O.
(8–20–2M)

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION.
MANAGING AGREEMENT.

This Managing agreement, made this 18th day of September, 1919, by and between the United States Shipping Board Emergency Fleet Corporation, the first party, hereinafter called THE CORPORATION, and William Dimond & Company of the second party, hereinafter called the MANAGER, Witnesseth:

WHEREAS THE CORPORATION is operating the vessel EELBECK and certain other vessels and desires to make an agency contract with THE MANAGER for the husbanding and managing of said vessel and such other vessels as it has assigned and may assign to THE MANAGER for such purpose;

Now, THEREFORE, IT IS AGREED AS FOLLOWS:

FIRST. THE CORPORATION hereby appoints THE MANAGER as its agent for the husbanding and managing of the vessel EELBECK and such other vessels as the CORPORATION has assigned, and may from time to time assign, to THE MANAGER for such purpose.

SECOND. THE CORPORATION will provide and pay for all fuel, fresh water, stevedoring, port

charges, pilotages, agencies, commissions and consular charges, except those pertaining to the master, officers and crew, and all other expenses which are usually borne by a time charterer of a vessel.

THIRD. THE MANAGER as such agent:

(a) Shall act as THE MANAGER of the vessel in such trade or service as THE CORPORATION shall direct being subject to the orders of THE CORPORATION as to voyages, cargoes, priorities of cargoes, charters, rates of freight, and other charges, and as to all matters connected with the use of the vessel.

(b) Shall take proper delivery of the vessel from the Operation or Construction Division of THE CORPORATION, or from the owner, builder or anyone else having control, as THE CORPORATION may direct.

(c) Shall exercise due diligence to men, equip, victual and supply the vessel and to provide and pay for all provisions, wages, and consular, shipping and discharging fees of the master, officers, and crew; all cabin, deck, engine-room, and other necessary stores; and all other costs and expenses (except those expenses to be paid by THE MANAGER out of his own funds covered by the compensation and fees hereafter provided for) properly incident to the management of the vessel, including war risk insurance, if any, required by law on the master, officers and crew.

(d) Shall exercise due diligence to maintain the vessel in a thoroughly efficient state in hull, machinery, tackle, apparel, furniture and equip-

ment, procuring for and on behalf of THE CORPORATION the necessary labor and material to effect ordinary running repairs and replacements. No extraordinary repairs or expenses shall be made or incurred and no alteration in hull, machinery, or equipment shall be made, by THE MANAGER, except in serious emergency, without first securing in writing the authorization of THE CORPORATION.

(e) Shall exercise due diligence to see that no damage to the vessel arises from loading improper cargo, from improper stowage, or from improper berthing of the vessel.

(f) Shall, whenever no separate Operator is acting, do the things required of an Operator under the terms and conditions of the regular form of Operating Agreement of THE CORPORATION then in use. [68]

(g) Shall hold all moneys collected on behalf of THE CORPORATION, and shall deposit the same in national banks or banks which are members of the United States Federal Reserve Association, as a separate trust fund to be designated "William Dimond & Company, Shipping Board Fund," and shall not mingle the same with other moneys owned or held by THE MANAGER, and shall make from such funds all disbursements hereinafter authorized to be paid by or to THE MANAGER for account of THE CORPORATION, and shall, promptly after the dispatch of each vessel, or at such other times as may be directed, account to THE CORPORATION for

moneys received and disbursed. No items not supported by vouchers aggregating more than $10 will be allowed.

(h) Shall keep separate accounts in such manner and form as may be prescribed by THE CORPORATION of all moneys collected and disbursed, and accord to accountants and other representatives of THE CORPORATION access to all books and papers, and render such assistance in the examination thereof, as the CORPORATION MAY REQUIRE.

(i) Shall exercise due diligence to do or cause to be done all things which would be done by the owner, or the owner's agent, under the usual government form of time charter, attending to all matters in connection with the management of the vessel.

FOURTH. THE CORPORATION in consideration of the services or things herein agreed to be performed, shall pay compensation and allow commissions as follows:

A. COMPENSATION FOR MANAGEMENT.

I. For each vessel up to and including the fifth $400 per month, and at the same rate for each part of a month;

II. For each vessel in excess of five, $350 per month, and at the same rate for each part of a month.

Such compensation shall be payable to THE MANAGER from the day of delivery of each vessel to THE MANAGER until redelivery or loss.

B. COMMISSIONS FOR ADVANCING FUNDS.

1. If the MANAGER is without funds of THE CORPORATION, either as THE MANAGER or as THE OPERATOR, for the disbursement of the vessel in foreign or dependency ports, and funds are there advanced by THE MANAGER, or procured from others, a commission will be allowed in accordance with the usual commissions paid in the respective ports, as certified to the United States Shipping Board by the American Steamship Association, and verified by the Comptroller.

FIFTH: If the MANAGER shall knowingly permit any cargo to be carried without the consent of THE CORPORATION or THE OPERATOR, THE MANAGER shall receive no commission, fee, or other compensation for any services rendered during the voyage.

SIXTH: Whenever THE CORPORATION may legally have the advantage of any existing or future contracts of THE MANAGER for the purchase of material, fuel, supplies, or equipment, it shall have the benefit thereof, provided that such contracts may be made available to THE CORPORATION without unreasonably interfering with the requirements of other vessels owned or operated by THE MANAGER.

SEVENTH. THE CORPORATION shall reimburse THE MANAGER for all disbursements properly incurred on its behalf as authorized in this agreement.

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EIGHTH. All salvages shall be for the benefit of THE CORPORATION. This provision, however, shall not be construed to deprive THE MANAGER of any right to salvage reserved to THE MANAGER as vessel owner under any [69] charter.

NINTH. THE CORPORATION shall have the right, at any time to terminate this agreement as to any or all vessels assigned to THE MANAGER, and to assume forthwith control of any or all of the vessels and to collect directly, all freights, moneys or other charges remaining unpaid. THE MANAGER, however, in such case shall adjust, settle, and liquidate the current business of the vessel if so required by THE CORPORATION.

TENTH. Upon giving THE CORPORATION thirty days' written notice, THE MANAGER shall have the right to terminate this agreement, such termination not to become effective as to any vessel until its arrival and discharge at a United States port. THE MANAGER shall, however, if required by THE CORPORATION, adjust, settle, and liquidate the current business of the vessel.

ELEVENTH. THE MANAGER shall, at the time of execution and delivery of this agreement, or at any other time, if so required by THE CORPORATION furnish a satisfactory bond in such amount as THE CORPORATION may order, for the faithful and proper discharge of the obligations and duties hereunder assumed.

TWELFTH. This agreement is made with the distinct understanding that THE MANAGER has in his service a competent shore force consisting of at least one port captain and one port engineer, and in the event that six or more vessels are assigned to THE MANAGER, one port steward, each of whom has had actual sea experience in his respective capacity.

THIRTEENTH. This agreement shall apply to the management of all vessels assigned to THE MANAGER, sailing from United States ports on or after the 1st day of March, 1919.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION,

Witness as to signature:

(Sgd.) H. NEWMAN.

(Sgd.) H. H. EBEY,

By ————————,

Ass't Director of Operations,

For Director of Operations.

WILLIAMS, DIMOND & COMPANY.

Witness as to signature:

(Sgd.) GEO. S. DOADAM.

By (Sgd.) E. R. DIMOND, Member of the Firm,

The Manager. [70]

EXHIBIT "B."

Form O–2.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION OPERATING AGREEMENT.

THIS OPERATING AGREEMENT made this 18th day of Sept. 1919, by and between the United States Shipping Board Emergency Fleet Corporation, the first party, hereinafter called THE CORPORATION and WILLIAMS DIMOND & COMPANY —— OF ——, the second party, hereinafter called THE OPERATOR, Witnesseth:

WHEREAS THE CORPORATION is operating the vessel EELBECK and certain other vessels and desires to make an agency contract with THE OPERATOR for the operation of said vessel and such other vessels as it has assigned and may assign to THE OPERATOR for such purpose;

NOW, THEREFORE, IT IS AGREED AS FOLLOWS:

FIRST, THE CORPORATION hereby appoints THE OPERATOR AS its agent for the operation of the vessel EELBECK and such other vessels as THE CORPORATION has assigned, and may from time to time assign, to THE OPERATOR for such purpose.

SECOND, THE CORPORATION will man, equip, victual, and supply the vessel, and provide and pay for all provisions, wages, and con-

sular, shipping, and discharging fees of the master, officers, and crew, and all cabin, deck, engine-room, and other necessary stores; and will exercise due diligence to maintain the vessel in a thoroughly efficient state in hull, machinery, tackle, apparel, furniture, and equipment for and during service.

THIRD, THE OPERATOR, as such agent:

(A) Shall operate the vessel in such trade or service as THE CORPORATION shall direct, being subject to the orders of the CORPORATION as to voyages, cargoes, priorities of cargoes, charters, rates of freight, and other charges, and as to all matters connected with the use of the vessel.

(B) Shall provide and pay for all fuel, fresh water, stevedoring, port charges, pilotages, agencies, commissions, and consular charges, except those pertaining to the master, officers and crew and all other expenses which are usually borne by a time charterer of a vessel.

(C) Shall exercise due diligence to see that all freight is prepaid, except when otherwise instructed by THE CORPORATION, or where the prevailing customs in the particular trade are to the contrary, in which case freight may be made payable at destination in accordance with such custom. All freight in cases where cargo is perishable or not worth the freight charges must be prepaid unless the custom of the trade is to the contrary.

(D) Shall issue or cause to be issued to shippers customary freight contracts and bills of lad-

ing, and shall exercise due diligence to see that such bills of lading contain all exemptions and stipulations usual to the particular trade or service in which the vessel may be engaged, and reserve to THE CORPORATION a lien upon all cargoes for the payment of freight, primage charges, dead freight, demurrage, forwarding charges, advance charges for carriage to port of shipment, for contributions in general average and special charges on cargo, and for all fines or damages which the vessel or cargoes may incur by reason of illegal, incorrect or insufficient marking or addressing of packages, or description of their contents, and in trades where customary, make the shipments subject to [71] usual war clauses, to the "Harter Act," to a provision that all general average shall be settled, unless otherwise directed by THE CORPORATION, at New York in accordance with York-Antwerp rules of 1890, and Antwerp rule of 1903, and otherwise in accordance with the rules and customs of the port of New York, and also subject to the following clause:

> "If the owner of the ship shall have exercised due diligence to make said ship in all respects seaworthy and properly manned, equipped, and supplied, it is hereby agreed that in case of loss, damage, danger, or disaster resulting from fault or negligence of the pilot, master, or crew, in the navigation or management of the ship, or from latent or other defects or unseaworthiness of the ship, whether existing at the time of shipment

or at the beginning of the voyage or on the voyage, but not discoverable by due diligence, the owner shall not be liable therefor, and the consignee or owners of the cargo shall not be exempt from liability for contribution in general average, or for any special charges incurred, but with the shipowner shall contribute in general average and shall pay such special charges as if such loss, damage, danger, or disaster had not resulted from such fault, negligence, latent or other defect or unseaworthiness."

(E) Shall collect all freights and other money due THE CORPORATION, advance all funds for all expenses properly to be paid by him as agent, and take proper general average security.

(F) Shall hold all money collected on behalf of THE CORPORATION, and shall deposit the same in national banks or banks which are members of the United States Federal Reserve Association, as a separate trust fund, to be designated "WILLIAMS DIMOND & COMPANY Shipping Board Fund," and shall not mingle the same with other moneys owned or held by THE OPERATOR, and shall make from such funds all disbursements hereinafter authorized to be paid by or to THE OPERATOR for account of THE CORPORATION; and shall, promptly after the dispatch of each vessel, or at such other times as may be directed, account to THE CORPORATION for moneys received and disbursed. No

items unsupported by vouchers aggregating more than $10 will be allowed.

(G) Shall keep separate accounts in such manner and form as may be prescribed by THE CORPORATION of all moneys collected and disbursed, and accord to accountants and other representatives of THE CORPORATION access to all books and papers, and render such assistance in the examination thereof as THE CORPORATION may require.

(H) Shall, in order to prevent speculation in freight or passenger space, exercise due diligence to see that all freight contracts show the name of actual shipper, commodities, quantities, and freight rates, except that in coastwise trade of the United States and in the West Indies trade the freight rate need not be shown on permits, but must be shown on bills of lading and must be the rate in current tariffs. No space allotted to the original shipper may be sublet on any terms or conditions whatsoever without the consent of THE CORPORATION. If THE OPERATOR shall, without the consent of THE CORPORATION, knowingly carry any cargo, the space for which has been sublet by the original shipper upon any terms or conditions whatsoever, THE OPERATOR shall receive no commission, fee, or other compensation for any services rendered during the voyage.

(I) Shall exercise due diligence to see that all bills of lading when issued agree with the freight contracts, that all wharf receipts for freight are

non-negotiable, and that a freight contract or permit is issued for each shipment.

(J) Shall exercise due diligence to perform or cause to be performed all of the customary agency duties concerned with loading and discharging cargoes at all ports included in the vessel's itinerary, and all [72] things necessary for the protection and safeguarding of the interests of THE CORPORATION.

FOURTH, THE CORPORATION in consideration of the service or things herein agreed to be performed, shall pay compensation and allow commissions and fees as follows:

A. COMPENSATION PAYABLE TO THE OPERATOR.

I. ON ALL VESSELS EXCEPT TANKERS.

(A) From United Ports:

(1) On general cargo, a commission of 2½ per cent on the gross ocean freight list.

(2) On bulk cargo a commission of 1¼ per cent on the gross ocean freight list.

The term "bulk cargo" as used herein shall include a cargo, a substantial part (amounting to 50 per cent or more) of which is loaded at one port and discharging at one port when covered by one bill of lading, and delivery is made without regard to marks or numbers, and

all United States Government cargoes, when vessel is exclusively laden therewith. Whenever the excess over such substantial part is general cargo, the commission payable on general cargo as above shall be paid on the freight earnings on such excess. Where Government cargoes are carried, and no charge or a nominal charge is made therefor the commissions and fees shall be based upon a freight schedule established in each case by the United States Shipping Board for such purpose.

(B) Into United States ports from foreign and dependency ports, a fee of $250 for each vessel.

The term "dependency ports" as used herein, shall include ports in the Hawaiian Islands, Porto Rico, Virgin Islands, Guam, Canal Zone, Philippine Islands, and Alaska.

(C) From or into United States Ports, one commission of 5 per cent on all mails, express, and commercial passenger revenue. This commission also covers all agency commissions and fees paid in foreign or dependency ports, except brokerages authorized to be paid under C–II.

II. ON TANKERS.

Between United States Ports and foreign and dependency ports, a fee of $100 for each vessel.

B. COMMISSIONS AND FEES PAYABLE TO OTHERS THAN THE OPERATOR FOR UNLOADING, LOADING AND ATTENDANCE AT FOREIGN AND DEPENDENCY PORTS.

1. ON ALL VESSELS INCLUDING TANKERS.

(A) A commission or fee for agency services in accordance with the usual commissions and fees paid in the respective ports, as certified to the United States Shipping Board by the American Steamship Association, and verified by the comptroller, provided that any commission or fee paid for attending to any mail, express, or commercial passenger revenues shall be borne by THE OPERATOR out of the Commission allowed him under A–1 (C) supra except the brokerages authorized to be paid under C–II.

The same customary commission and fees of the port will be allowed the branch house of THE OPERATOR as would be allowed to others than such branch house. [73]

C. COMMISSIONS AND FEES NOT OTHERWISE AUTHORIZED.

I. In cases where freight and charter brokerages are necessarily or properly incurred in United States ports to secure cargoes and charters, and are paid in accordance with the usages of the trade, a brokerage commission not exceeding 1¼ per cent will be allowed. In such cases in foreign or dependency ports, freight and charter brokerages will be allowed in accordance with the usual commissions and fees paid in the respective ports, as certified to the United States Shipping Board by the American Steamship Association, and verified by the comptroller.

II. In cases where passenger tickets are necessarily sold through a broker in foreign or dependency ports, a brokerage commission will be allowed in accordance with the usual commissions in the respective ports, as certified to the United States Shipping Board by the American Steamship Association, and verified by the comptroller.

III. IF THE OPERATOR, is without funds of THE CORPORATION to meet disbursements of the vessel in foreign or dependency ports, and funds are there advanced by the OPERATOR, or procured from others, a commission will be allowed in accordance with the usual commissions paid in the respective ports, as certified to the United States Shipping Board by the Amer-

ican Steamship Association, and verified by the comptroller.

IV. For entering and clearing a vessel light or in ballast into and from United States ports from and to foreign or dependency ports, respectively, or into and from United States Atlantic ports from and into United States Pacific ports, respectively, a fee of $20 will be allowed. No fee will be allowed for entering or clearing vessels light or in ballast into and from United States Ports from and into United States ports other than these above mentioned.

V. If the vessel, after cargo it booked, is diverted by THE CORPORATION to a port other than that named or contemplated in the original shipping documents, no additional compensation will be paid on any increase in freight earnings resulting from such diversion, but THE OPERATOR will be paid an additional fee of $250 for performing the services incidental and necessary to the diversion.

FIFTH. Whenever THE CORPORATION may legally have the advantage of existing or future contract of THE OPERATOR for the purchase of material, fuel supplies, or equipment, it shall have the benefit thereof, provided that such contracts may be made available to the CORPORATION without unreasonably interfering with the requirements of other vessels owned or operated by THE OPERATOR.

SIXTH. THE CORPORATION shall reimburse THE OPERATOR for all disbursments properly incurred on its behalf as authorized in this agreement.

SEVENTH. All salvages shall be for the benefit of THE CORPORATION. This provision, however, shall not be construed to deprive THE OPERATOR of any right to salvage reserved to THE OPERATOR as vessel owner under any charter.

EIGHTH. THE CORPORATION shall have the right at any time to terminate this agreement as to any or all vessels assigned to the OPERATOR, and to assume forthwith control of any or all of the vessels, and to collect directly all freights, moneys, or other charges remaining unpaid. The OPERATOR, however, in such cases shall adjust, settle, and liquidate the current business of the vessels if so required by THE CORPORATION. [74]

NINTH. Upon giving THE CORPORATION thirty days' written notice, THE OPERATOR shall have the right to terminate this agreement, said termination not to become effective as to any vessel until its arrival and discharge at a United States port. THE OPERATOR shall, however, if required by THE CORPORATION, adjust, settle, and liquidate the current business of the vessel.

TENTH. THE OPERATOR Shall at the time of execution of this agreement or at any other time, if so required by THE CORPORATION, furnish a satisfactory bond in such amount as THE CORPORATION may order for the faithful and proper

discharge of the obligations and duties hereunder assured.

ELEVENTH. This agreement shall apply to the operation of all vessels assigned to THE OPERATOR, sailing from United States ports on or after the 1st day of March, 1919.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION.

Witness as to signature:

(Sgd.) H. NEWMAN.

By (Sgd.) H. H. EBEY,
Ass't Director of Operations.
For Director of Operations.

WILLIAMS, DIMOND & COMPANY.

Witness as to signature:

(Sgd.) GEO. S. DOADAM. [75]

By (Sgd.) E. R. DIMOND, Member of the Firm,

The Operator.

THE UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION

Bill of Lading—Pacific Form

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	900	Double Bags Sisal	90000 Lbs

The vessel shall have liberty to deviate for the purpose of saving [illegible] and shall be paid any increased cost of [illegible] insurance, if any, incurred in consequence thereof.

[illegible] 90000 lbs at $6.00 per 100 lbs

WILLIAMS, DIMOND & CO.

TWO

WILLIAMS, DIMOND & CO.

SHIPPER. MASTER OR AGENTS.

THIS BILL OF LADING WHICH CONSTITUTES THE CONTRACT BETWEEN THE SHIPPER OR OWNER OF THE PROPERTY CLAIMED AND THE UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION.

EXHIBIT "E."

EUROPEAN PACIFIC LINE

DIRECT SAILINGS

OUTWARD

S.S. "Effingham" (for London, Liverpool and Hamburg).....Sails Dec. 6
S.S. "Cockaponset" (for Antwerp, Hamburg and Rotterdam).....Sails Dec. 13
S.S. "West Alota" (for Hamburg, Rotterdam and Cardiff).....Dec. —

HOMEWARD

S.S. "Dulwich" (loading London).....Dec.
S.S. "Wren Katan" (loading Havre and London).....Dec.
S.S. "Dewey" (loading Bristol, Liverpool and London).....
S.S. "Orani" (loading London, Liverpool and Glasgow).....
S.S. "Cockaponset" (loading Hamburg, Antwerp and Rotterdam).....

W. W. THURSTON, Gen. European Agent

E. H. MURDY,
Agent General United Kingdom
No. 1 Poultry Ave., London, E. C.

WILLIAMS, DIMOND & CO.

Managers and Operators for U. S. Shipping Board

310 SANSOME ST., SAN FRANCISCO
Telephone Sutter 7000

EXHIBIT "F."

EUROPEAN PACIFIC LINE

DIRECT SAILINGS

— Freight only —

For European Ports

S.S. EFFINGHAM.....Sails Dec. 6
(For Hamburg, London and Liverpool)
S.S. COCKAPONSET.....Sails Dec. 13
(For Havre, Antwerp and Rotterdam)
S.S. WEST ALOTA.....Sails late Dec.
(For Hamburg, Rotterdam and Cardiff)

From European Ports

S.S. KELSEAN.....(Loading London).....Dec.
S.S. WREN KATAN.....(Loading Havre and London).....Dec.
S.S. DEWEY.....(Bristol, Liverpool and London).....(—)
S.S. ORANI.....(London, Liverpool and Glasgow).....(—)

W. W. THURSTON, Gen. European Agent
E. H. MURDY, Agent General United Kingdom
No. 1 Poultry Ave., LONDON, E. C.

WILLIAMS, DIMOND & CO.,

Managers and Operators for United States Shipping Board
310 Sansome St., San Francisco. Tel—Sutter 7000

EXHIBIT "G."

TRANSLATION of Protest Extended Before the Tribunal of Amsterdam.

On this day the twentieth of February, 1920, has appeared before Us, Dr. S. J. Carsten, Justice of the Tribunal of Amsterdam, in the presence of and assisted by Dr. H. B. van der Elat, Deputy-Recorder of the said Tribunal, Mr. George Hillier Ewart, master of the American steamer "West Aleta," who, while producing the ship's logbook on which We have on this day placed our Exhibition, has made to Us the following deposition, in the presence of the members of his crew named hereinafter, by intermediary of Mr. Jan Adrianus Pieter Byl residing at Amsterdam, appointed by Us to act as interpreter and to whom We have administered the following oath or solemn declaration: that he shall faithfully perform his duties as interpreter;

That the said ship being tight, staunch and strong, masts and pumps fitted with efficient double coats, fully provided with everything that is necessary for proper control of water, engines in good order, and consequently in a thoroughly efficient and responsible state to carry merchandise over sea, was loaded at San Francisco from the 26th December 1919 until the 6th January of this year, with a complete general cargo, bound for Hamburg, Rotterdam and Cardiff;

That on the 7th January A. M. he left San Francisco with the said ship, crew consisting of 46 members, himself included, cargo properly loaded,

located, stowed, dunnaged and secured as customary hatches closed, covered with good double tarpaulins and battened.

That they steamed through the Panama Canal and sailed from Christobol on the 21st January at 12.20 P. M.

That the sea voyage was continued without any obstacles except that he encountered bad weather in the Carribean Sea;

That on the 10th February at 2 A. M. he passed Bishop Rocks [81] at a distance of 14 miles, passed Lizzard at 6.30 A. M. at 6½ miles' distance and St. Catherine's Lightship at 8.35 P. M. at 9½ miles' distance;

That on the 11th February at 6.35 A. M. he passed South Foreland at 2 miles' distance and East Goodwin' Lightship at 7.20 A. M. at 1¾ miles' distance, where the deep sea lead was cast and they shaped course 38° true (45° by standard compass) with 7° Easterly variation and 14° Westerly deviation; At that moment the log indicated 210;

At noon the position of the ship on observation appared to be 51° 53′ 28″ Lat. N. and 2° 25′ Long. E. After the ship had proceeded 30 miles another observation was made at 2.30 P. M. in order to check course and position, when she was found to be in 52° 12′ 16″ Lat. N. and 2° 49′ 24″ Long. E.

That towards 3 P. M. the weather changed and they had to contend with strong windsqualls which grew heavier and heavier until it was blowing a strong N. W. gale and the seas became running high;

That at 8.40 P. M. on account of the heavy rolling and labouring of the ship, they put the vessel head to sea, 15° true course (24° standard) whilst the log indicated 88;

That at 10 P. M. they changed the course to E. N. E. magnetic, for fear of entering the northern minefield and also in order to be able to control the position of the ship and the current by bearing the lighthouse on the Dutch coast;

That at 11 P. M. taking cross bearings Kykduin S. E. magnetic, Eierland E. ½ S. magnetic, he had fixed the position of the ship in accordance with the observation of that position at noon at 19 miles' distance, log 107½ Course NE. magnetic had just been shaped, taking drift and tide into account;

That on the 12th of February at 1.30 A. M. he observed on the starboard bow a white flashing light showing sudden flashes of 5 seconds duration, which corresponds with the nature of Norderney [82] lightship and also an illuminated white buoy showing a glare every 7½ seconds which corresponds with the nature of buoy D of the war channel (it is customary to control all lights with a second watch with a stop-spring, which was also done in this instance;

That the course of the ship was deviated to 109° standard compass, equal to about 100° magnetic, in order to pass quite close alongside the buoy and to keep at a safe distance from the lightship;

That at 2.15 he decreased the ship's speed, as he wished further to control the position of the ship with respect to the depth of water and to take accurate soundings;

That at 2.25 when the ship was lying almost still, an accurate sounding was taken which indicated 14 fathoms. The distance performed and various nautical auxilliary means were all checked and by doing so we felt quite sure of being safely in the war channel but nevertheless we proceeded slowly into the direction of Norderney lightship, for the true course was 90° through the middle of the war channel which was deemed to contain the lightship we had in view;

That at 2.28 the ship struck what afterwards proved to be a sand ridge which projected several miles to the northward from the western end of the isle of Terschelling.

That the engines were instantly put full speed astern, but the swell also caused the ship's broadside to be swung round the engines were then put full speed ahead in order to put the vessel again bow to sea. The ship swang round fully 60°. As we were unable to get the ship any further and as she was falling off again, the engines were reversed once more, the so desired effect of which being that the ship's stern was again turned to the sea, after which the ship and particularly her stern did not take breakers any more; [83]

That shortly after being aground a radio message was despatched which was answered by the s. s. "Tillford" and likewise by a station on shore. The "Tillford" communicated that she was coming to render assistance and the station on shore advised that 2 tugs were under way to render assistance, after which we requested to send out the lifeboat,

because the position of the ship was very dangerous and she did already begin to bend badly, both afore and abaft of the midship's house. The sea was too heavy for lowering the ship's lifeboats into the water and we decided to await for the arrival of the lifeboat, at the same time working the engines thoroughly in order to prevent the broad side of the ship from capsizing.

We succeeded in attaining this end, it seemed that the ship was only aground amidships. At about 7.50 A. M. the ship gave signs of breaking up and the position became serious. The safety of the crew required all to leave the ship. This was fortunately accomplished by means of the lifeboat which landed the entire crew in Terschelling.

Shortly after landing the lookout went into the lighthouse from where the ship could be seen and it then appeared that the ship had already broken in two. According to the observation made at noon the distance performed from the position last stated, corresponded with all data stated above concerning light ships mentioned in the war channel, born by taking soundings, and the error in the prevent position of the ship can only be attributed to positive and unknown increase of the force of the drift, which drifted the ship on shore;

That the damage which has already been or may still be found to ship and cargo, has not been caused by any previously existing defect of ship, rigging, machinery or appurtenances, bad stowage or other insufficient care of the cargo, nor by the action or neglect of him, the appearer, or his crew, but must

solely be attributed to the strong winds, high seas, the labouring, pitching [84] and rolling of the ship and the big quantities of seawater that washed on board during this voyage, and to the accident described above, whereas he has used proper seamanship in every respect, lost no time nor wind, attended properly to the pumps, keeping them as dry as far as practicable and taken continuous care of a proper ventilation of the cargo.

And moreover, have appeared:

RARISON WILSON, Chief Officer,
JOSEPH HEARY JOHN DELANEY, Second Officer,
WILLIAM HEARY SHARPE, Chief Engineer,
GEORGE STANLEY KRAMER, Second Engineer,

all engaged on board the said ship during the said voyage, who have declared each one separately, but in the same tenor;

That all statements made by their master as above, are in conformity with the truth;

That they have been honest and faithful in handling the cargo, without having committed any fraud or theft and that they do not know of such a thing having been done by anybody else, either directly or indirectly.

As these depositions may and shall serve to prove any losses, disasters, or damages, and any claims whatever of the charterers of the ship, the appearers have finally requested us to be allowed to affirm their foregoing declarations by oath.

Prior to affirming the deposition by oath, ap-

peared Delaney testified not having been present at the controlling of the position, although he was on the watch, his work having required him to be engaged on the afterpart of the ship.

Thereupon all appearers have affirmed their statements by taking the prescribed oath in our hands.

In witness whereof this protest has been drawn up and after being read in the English language by the above-named interpreter and approved by the appearers, signed by the latter, the interpreter, by Us, Justices of the Peace and the above-named Recorder. [85]

(w. s.) G. H. SWART.
H. WILSON.
J. J. DELANEY.
W. H. SHARPE.
G. S. KRAMER.
J. A. P. BYL.
A. J. CARSTEN.
H. B. v. d. ELST.

A true copy of the original.

THE RECORDER OF THE TRIBUNAL OF AMSTERDAM.

Translated by

_____,

Sworn Translator, Rotterdam.

[Endorsed]: Filed Nov. 20, 1924. [86]

[Title of Court and Cause.]

IN ADMIRALTY—No. 17,692.

NOTICE TO PRODUCE.

To Rosenberg Bros. & Co., a Corporation, Libelant Above Named, and to J. M. Mannon, Farnham P. Griffiths, and Messrs. McCutchen, Olney, Mannon & Greene, Its Proctors:

You and each of you are hereby notified to produce before the trial of the above-entitled matter the following documents, to wit:

1. Original loading tags or receipts given to shipper for all cargo shipped on the S. S. "West Aleta," Voyage 51, sailing from San Francisco, January 6, 1920;

2. All letters to and from the shipper relative to securing option for space for cargo to be shipped on the S. S. "West Aleta" and relative to booking cargo thereon;

3. Original notices or circular letters sent to shipper by Messrs. Williams, Dimond Co. relative to schedule for [87] ports of call, and date of departure;

4. Applications for insurance on cargo shipped on the S. S. "West Aleta," Voyage 51;

5. Originals of all policies issued to shipper for cargo on the "West Aleta," Voyage 51;

6. All open policies and certificates issued thereon for cargo shipped on the S. S. "West Aleta," Voyage 51;

7. Invoices showing premiums paid and certificates issued on cargo shipped on the "West Aleta," Voyage 51; and,

8. Original entry books covering open policies, in which entries relative to certificates issued thereunder were made.

IRA S. LILLICK,
Proctor for Respondent.

Due service and receipt of a copy of the within notice is hereby admitted this 24th day of December, 1924.

McCUTCHEN, OLNEY, MANNON & GREENE.

[Endorsed]: Filed December 29, 1924. [88]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof in the City and County of San Francisco, on Monday the 29th day of December, in the year of our Lord one thousand nine hundred and twenty-four. Present: The Honorable FRANK H. KERRIGAN, Judge, et al.

[Title of Court and Cause.]

No. 17,692.

MINUTES OF COURT—DECEMBER 29, 1924—HEARING.

This suit came on regularly this day to be heard. J. M. Mannon and F. P. Griffiths, Esqrs., appear-

ing as proctors for libelant and Ira S. Lillick, Chalmer G. Graham and J. Arthur Olson, Esqrs., appearing as proctors for respondent.

Mr. Mannon made statement to the Court on behalf of the libelant and introduced in evidence and read the agreed statement of facts, which was marked Libelant's Exhibit No. 1. Libelant introduced in evidence and filed its exhibits marked Nos. 2, 3, 4, 5, 6, 7 and 8.

ORDERED deposition of Walter M. Strong opened, refiled, and introduced in evidence, together with the exhibit referred to therein; and thereupon libelant rested.

Mr. Graham made a statement to the Court on behalf of respondent.

Fred A. Hooper, E. C. Gross, L. K. Grimm and W. H. Houston were sworn and testified on behalf of the respondent. Respondent introduced in evidence and filed its exhibits marked "A," "B" and "C." On cross-examination of Fred A. Hooper, libelant introduced in [89] evidence and filed its exhibits marked Nos. 9 and 10. Pending the further cross-examination of Fred A. Hooper, it is ORDERED that the further hearing hereof be continued until 10 o'clock A. M. to-morrow. [90]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof in the City and County of San Francisco, on Tuesday, the 30th day of December, in the year of our Lord one thousand nine hundred and twenty-four. Present: The Honorable FRANK H. KERRIGAN, Judge, et al.

[Title of Cause.]

No. 17,692.

MINUTES OF COURT—DECEMBER 30, 1924—HEARING (RESUMED).

The parties with their attorneys being present as heretofore, the hearing hereof was resumed.

Fred A. Hooper was recalled and further testified on behalf of the respondent. On cross-examination of Fred A. Hooper, the libelant introduced in evidence its exhibits marked No. 11 and No. 12.

C. H. Chandler, James J. Rudden, E. F. R. DeLancy, Fred L. Doelker and Harry L. Evans were sworn and testified on behalf of respondent. Respondent introduced in evidence and filed its exhibits marked "D," "E" and "F."

ORDERED that the further hearing hereof be continued until ten o'clock A. M. to-morrow. [91]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof in the City and County of San Francisco, on Wednesday, the 31st day of December, in the year of our Lord one thousand nine hundred and twenty-four. Present: The Honorable FRANK H. KERRIGAN, Judge, et al.

[Title of Cause.]

No. 17,692.

MINUTES OF COURT—DECEMBER 31, 1924—HEARING (RESUMED).

The parties with their attorneys being present as heretofore, the hearing hereof was resumed.

Harry L. Evans was recalled and further testified on behalf of respondent. Alfred E. Wolff, Erik Krag and E. B. Wolff were sworn and testified on behalf of respondent.

Libelant introduced in evidence and filed its exhibits marked Nos. 14, 15, 16 and 17.

ORDERED that the further hearing hereof be continued to Friday, Jan. 2, 1925, at 10 A. M. [92]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 2d day of January, in the year of our Lord one thousand nine hundred and twenty-five. Present: The Honorable FRANK H. KERRIGAN, Judge, et al.

[Title of Cause.]

No. 17,692.

MINUTES OF COURT—JANUARY 2, 1925—HEARING (RESUMED).

The parties by their attorneys being present as heretofore, the hearing hereof was resumed.

W. J. Lane, E. B. Steward, William J. Murray and Ethel Olsen were sworn and testified on behalf of respondent. Respondent introduced in evidence and filed its exhibits marked "G," "H," "I," "J," "K"; and respondent rested.

ORDERED that the further hearing hereof be and same is hereby continued until Tuesday, January 6, 1925, at 10 A. M. [93]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 6th day of January, in the year of our Lord one thousand nine hundred and twenty-five. Present: The Honorable FRANK H. KERRIGAN, Judge, et al.

[Title of Cause.]

No. 17,692.

MINUTES OF COURT—JANUARY 6, 1925—HEARING (RESUMED).

The parties and their attorneys being present as heretofore, the hearing was resumed. Libelant introduced in evidence and filed its exhibits marked Nos. 18, 19 and 20.

J. S. Jenks, R. Sciaroni and W. T. Bozeman were sworn and testified on behalf of libelant.

Respondent introduced in evidence and filed its exhibits marked "L" and "M."

Ordered further hearing continued to 10 o'clock A. M. to-morrow. [94]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 7th day of January, in the year of our Lord one thousand nine hundred and twenty-five. Present: The Honorable FRANK H. KERRIGAN, Judge et al.

[Title of Cause.]

No. 17,692.

MINUTES OF COURT—JANUARY 7, 1925—HEARING (RESUMED).

The parties and the attorneys being present as heretofore, the hearing was resumed.

H. R. Higgins, Thomas W. Smith and J. W. Jory were sworn and testified on behalf of libelant.

Respondent introduced in evidence and filed its exhibits marked "N" and "O."

Libelant introduced in evidence and filed its exhibits marked Nos. 21 and 22; and libelant rested. The evidence was thereupon closed.

ORDERED that this suit be submitted on briefs to be filed in 15, 15 and 10 days. [95]

[Title of Court and Cause.]

No. 17,693.

DEPOSITION OF WALTER MERVYN STRONG, FOR LIBELANT.

BE IT REMEMBERED: That on Monday, December 15, 1924, pursuant to stipulation of counsel, at the offices of Messrs. McCutchen, Olney, Mannon & Greene, in the Balfour Building, in the City and County of San Francisco, State of California, personally appeared before me, Frank L. Owen, a notary public in and for the City and County of San Francisco, State of California, authorized to take acknowledgments of bail and affidavits, etc., Walter Mervin Strong, a witness called on behalf of libelant.

J. M. Mannon, Jr., Esq., and Edwin S. Pillsbury, Esq., appeared as proctors for the libelant, and Ira S. Lillick, Esq., and C. G. Graham, Esq., appeared as proctors for the respondent, and the said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth.

(It is hereby stipulated and agreed by and between the proctors for the respective parties that the depositions of the above-named witness may be taken *de bene esse* on behalf of the [96] libelant at the office of Messrs. McCutchen, Olney, Mannon & Greene, in the Balfour Building, in the City and County of San Francisco, State of California, on Monday, December 15, 1924, before Frank L. Owen,

a notary public in and for the City and County of San Francisco, and in shorthand by E. W. Lehner.

(It is further stipulated that the deposition, when written up, may be read in evidence by either party on the trial of the cause; that all questions as to the notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at the time of taking of said deposition, and that all objections as to materiality, relevancy and competency of the testimony are reserved to all parties.

(It is further stipulated that the reading over of the testimony to the witness and the signing thereof are hereby expressly waived.) [97]

WALTER MERVYN STRONG, called for the libelant, sworn.

Mr. MANNON.—Q. State your full name, please, Captain. A. Walter Mervyn Strong.

Q. Your occupation? A. Master mariner.

Q. How long have you been going to sea, Captain?

A. I spent my fifteenth birthday at sea, and I have had my fortieth birthday.

Q. How long have you been a master mariner?

A. Since 1915; I was captain of the "Californian," made captain of the "Californian" in 1915.

Q. What experience, if any, have you had in navigating the North Sea?

A. Well, the North Sea route, during the war I ran to the London bunkers, and then after the armistice I ran for the Food Administration, that

(Deposition of Walter Mervyn Strong.)

was in April and May, and I took a load of flour from St. Nazaire to Danzig, and that is when we had to take all of the swept channel.

Q. During the war period, Captain, of what vessel were you in command?

A. I was in command of the "Kerowlee"; you see when I first took her I was running for the Kerr Line, from Galveston to Havre, and then I was requisitioned in Havre by General Pershing, it was November 28 or December 28, 1918, I think it was—I don't know whether it was November or December; it was somewhere around the 28th.

Q. Then after that period how did you operate?

A. Then I was sent to Barry Island and put in the Cross Channel coal trade; I run for the Army, and then I run for the Navy, the Belgian Relief, and then, last of all, for the Food Administration.

Q. What ports on the English side of the Channel, if any, were you making at that time?

A. That particular time I went to [98] Barry Island for orders, and from there I would get orders to go to Cardiff, Penarth, Barry Docks or Swansea, that was for coal purposes, and then I would go to Brest for orders, and from there I would be sent to St. Nazaire, Nanee, La Pallice, and the next one south of that, Bordeaux.

Q. When did you finish your work, Captain, in the war, for the Navy or Army?

A. When I got out of the war.

Q. When was that?

A. The last voyage when the ship was turned

(Deposition of Walter Mervyn Strong.)

back in Norfolk, and that was when I was relieved from the Navy, that was on August 11, 1919.

Q. Is that Norfolk, Virginia?

A. Yes; that is when I was turned back to the owners.

Q. Then in August, 1919, what ship, if any, did you take command of?

A. I kept command of my ship.

Q. The same ship? A. Yes.

Q. Then what voyages after that did you make with that ship?

A. After the time that we were turned back I went to New York, and went to Morse's drydock, and we were there about a month reconditioning, and then I went in the New York-Hamburg trade for the Kerr Line and the Hamburg-American Line, combination, and I sailed from New York about the middle of September, 1919, and I was back—the voyages took from nine to ten weeks—and on my second voyage I arrived in Hamburg in December, I don't know whether it was the 22d or 23d.

Q. December, 1919, that was?

A. 1919, and I sailed from Hamburg about the middle of January.

Q. Of what year?

A. That was the middle of January, 1920; and then when we came back to New York, I think on that voyage I was something like 22 days getting over.

Q. So that after you left the Army or Navy service during the [99] war, how many trips into

(Deposition of Walter Mervyn Strong.)

the North Sea did you make with the "Kerowlee" up to say the month of February, 1920, if you know?

A. Three, that is, up into the Heligoland Bight.

Q. On the first of these voyages, where did you go?

A. On the first of the voyages, when I entered the North Sea, when we first passed into the Straights of Dover, we stop for examination by the British examination boat, for orders regarding notice to mariners through the mine fields, and on my first voyage, that was in April when I went up that way, we had to go through Downs, in through the Edinburgh Channel, and out through the Black Deep.

Q. That was April, 1919? A. Yes.

Q. Go ahead with your statement as to where you went from Downs?

A. Then when we came out of the Black Deep we went up, then, to Orford Ness, then we took that swept channel that brought us down around the Hook of Holland, then we used to follow the Dutch coast I think within four or five miles up to, I forget the name of the place, I could tell by looking at the chart—Ymuiden—we followed the Dutch coast up to there, and then from there we came out to Haaks Lightship, and then from Haaks Lightship we ran up to South Dogger Bank Lightship, and there is where the German light cruiser and torpedo boats lay, and they took us free through

(Deposition of Walter Mervyn Strong.)

the mine field and brought us down to Heligoland.

Q. What direction were you going then?

A. Going from South Dogger Bank Lightship we ran northeast up through the swept channel to Buoy No. 5a, then we steered about east, southeast, following the swept channel to Buoy No. 2, and then from there southeast to Heligoland, and at Heligoland the German pilot left, the admiralty pilot left, and I took an Elbe pilot into Brunswick, and then the Kiel Canal pilot took you through.

Q. State when it was that you made the trip that you *just* have [100] just described?

A. Now, that was when I was turned back to the owners; then they had cleaned up some of this field here; you can see by the other mine chart, they had cleaned up some of this mine field, here. This is an old chart, they had cleaned up some of this here.

Q. Before you get to that, I want to find out about what time you made the voyage you have just described. A. That one was in April.

Q. 1919? A. 1919.

Q. What port did you make on the German side at that time?

A. My first one was the Elbe River, I went through the Elbe to come up to Danzig.

Q. To get into Hamburg you likewise came into the Elbe River? A. Yes.

Q. Did you come back a different route?

A. No, I came back over the same route.

(Deposition of Walter Mervyn Strong.)

Q. When next, if at all, did you go into the North Sea with your ship?

A. Then I sailed about the middle of September —that was about the first part of October I came back, running for the Kerr Line, and New York-Hamburg Line.

Q. On what ship?

A. The same ship, the "Kerowlee," and I stopped at Downs for examination, and then that trip we passed up inside of the Sands—they had cleaned up this mine down here; I passed up inside of the Sands, and then from the Sands we cut across here, and this mine field—Buoy No. 6 was the entrance to the general mine field, and there there was this German admiralty pilot who took us through this new mine field, up to the Elbe, right along the north coast of Germany; homeward bound, that voyage, the German admiralty still maintained that free pilotage. [101]

Q. When was that you came out of Hamburg on that voyage, about?

A. About the latter part of October.

Q. 1919?

A. Yes. On the next voyage, when I arrived in the North Sea in December I came up then and I could go inside or outside of the Sands, and I took the inside, and then I ran up here just the same through the mine field to make the Terschelling Lightship, and they had done away with the Government pilot, that is, the admiralty pilot, and com-

(Deposition of Walter Mervyn Strong.)

ing out that voyage I took a civilian North Sea pilot and landed him at Dover.

Q. Where did you go on that voyage you went into the North Sea in December, 1919, on the German Coast, if anywhere? A. Into Hamburg.

Q. And about when was it that you went into Hamburg, if you know?

A. I went into Hamburg the first voyage in October, and on the second voyage in December.

Q. Both in 1919? A. 1919.

Q. When did you leave Hamburg with your vessel?

A. The last time I left Hamburg was about the middle of January, 1920.

Q. Where did you go with your vessel out from Hamburg? A. New York.

Q. From Hamburg to New York? A. Yes.

Q. And coming out of Hamburg what course did you follow—will you describe it in detail from the map, Captain?

A. You see, on these voyages we used to have to run down to a few miles off that buoy off Norderney.

Q. Captain, start right out at Hamburg and state how you started.

A. From Hamburg we came out through the Elbe, right by the buoy, that is where the river pilotage ceases, and then from there I shaped a course right straight down to the buoy off Norderney, one mile off of that buoy, and from there I shaped a course [102] through the buoyed channel through the mine field, and at that time they had not cleaned

(Deposition of Walter Mervyn Strong.)

away any of this mine field here; this was only three miles wide, that channel.

Q. Where is that place that you are now pointing to with relation to Terschelling Island?

A. Here is Terschelling, right here.

Q. What direction is it from Terschelling Island, the course that you are pointing to?

A. Well, we call this here, coming out of Heligoland Bight, going along the north coast.

Q. All I want you to identify, Captain, is, if you will, the course that you are now describing with reference to Terschelling Island.

A. From the Elbe 1 I shaped a course to the gas buoy north of Norderney, and from there I shaped a course to hit the buoyed channel through the mine field, into Terschelling, and followed that buoyed channel to the edge of that mine field, and from the mine field I shaped a course right down for the Straits of Dover.

Mr. MANNON.—Now, in connection with the testimony of this witness we offer in evidence the map that he has been using, and ask that it be marked Libelant's Exhibit Strong 1.

(The map was marked Libelant's Exhibit Strong 1.)

Q. Can you read the name of that map for me, there?

A. "Southern Part of the North Sea, Mine-Free Passage."

Q. Will you read this legend at the bottom of the map, merely for identification?

(Deposition of Walter Mervyn Strong.)

A. "Given out by the Berlin Admiralty, 1920."

Q. This plat, that has been marked Libelant's Exhibit Strong 1, where did you get it?

A. I bought it in Hamburg.

Q. Have you ever used it?

A. I have laid my course on it.

Q. Just tell me, Captain, when did you use that map? A. In December.

Q. 1919? A. And January, 1920. [103]

Q. That is the map, in fact, that you used in coming out of Hamburg?

A. Yes, every trip we used to get the latest one.

Q. Now, I show you this map which is marked "Supplement to the Pilot Chart of the North Atlantic Ocean, Washington, D. C., Published February, 1920, at the Hydrographic Office, Under the Authority of the Secretary of the Navy," and ask you if you have seen that chart before? A. Yes.

Q. Will you state what that is?

A. These were issued, I think, monthly.

Q. Where did you get that one?

A. You got them from the routing officer, he gave them to you.

Q. Where?

A. Like in New York, I would go up to get the latest notices to mariners, and they would give these out.

Mr. MANNON.—I will offer that document in evidence in connection with the testimony of this witness, and ask that it be marked Libelant's Exhibit Strong 2.

(Deposition of Walter Mervyn Strong.)

(The map was marked Libelant's Exhibit Strong 2.)

Q. What is this chart that you have produced here? A. We lost one of our own ships here—

Q. I want to get at the identification of these charts. Just what is this chart that you have before you?

A. That is the southerly sheet of the North Sea.

Q. Does it say on that when it was published?

A. Yes, August, 1920, latest correction.

Q. When you went into Hamburg in December, 1919, and when you came out of Hamburg in January 15, 1920, what was the condition of the water that you passed through with regard to floating mines?

A. They were worse than Heligoland Bight, and it depended on the direction of the wind; if they had a northwester for a few days, they would be all over Borkum Reef into the Elbe, and under conditions [104] like that we used to try to make that run in the daytime.

Q. Have you personally ever observed any mines there in December, 1919, or January, 1920?

A. Oh, yes; I could not say offhand how many; it would be according to the tide, and the way the wind had been blowing; when you ran into them you might find one or two together, and you would see sometimes one a watch, or sometimes six or seven a watch, that is the way it run.

Q. How long is a watch? A. Four hours.

Q. Now, on the voyage coming out of Hamburg

(Deposition of Walter Mervyn Strong.)

about January 15, 1920, that you testified to, can you state approximately how many floating mines you saw? A. In 1920?

Q. Yes.

A. You see, they broke adrift more after the winter months and the storms; when I came out in 1920, how many I saw I don't know.

Q. Can you state approximately, for the benefit of the record?

A. Those two trips the "Kerowlee" made over there and back again, I have seen not less than, I can honestly say, than between 6 and 8 mines on a passage each way over there.

Q. What were the conditions with regard to the Straits of Dover in connection with mines about January of 1920, if you know?

A. They had cleaned up, they had finished in January, 1920, they had cleaned up, but you could not anchor; they were swept, but you could not anchor; you could go right through in January—no, wait a minute—yes, in January the Straits of Dover were clear, you could run right straight down through.

Q. With regard to the entrance to Cardiff, can you tell whether or not there was danger from floating mines there in the year 1919, the latter part, and the early part of 1920?

Mr. GRAHAM.—I object to the question on the ground the [105] captain has not testified he was in Cardiff.

A. Before I came home, when I came back from

(Deposition of Walter Mervyn Strong.)

Danzig, I was over to Rotterdam, I went to Rotterdam and I laid there a week for orders, and then I got orders to go to Cardiff to get bunkers, and I was sent to St. Nazaire to load ordnance home for the United States.

Mr. MANNON.—Q. That trip that you have just described is the one you made in about April, 1919, you say?

A. Wait a minute. I will have to go back the other way. I have got to guess on this. I was in England during that bank holiday, whenever that was.

Q. Will you fix that as nearly as you can, the time you went into Cardiff, particularly, we are interested in.

A. Those bank holidays, it was somewhere around the middle of May.

Q. It was around the bank holidays of 1919?

A. Of 1919?

Q. What was the condition into Cardiff with regard to floating mines at that time?

Mr. GRAHAM.—I object to the question on the ground it is too remote; he has not definitely stated yet he was in Cardiff in April or May. He has merely stated on a bank holiday, but you have to bring it closer than that.

Mr. MANNON.—Q. Fix it as close as you can.

A. I can say within a few days of the last of May I was in Cardiff.

Q. In 1919? A. Yes.

Mr. GRAHAM.—I object to this further on the

(Deposition of Walter Mervyn Strong.)

ground that in the stipulation it is stipulated that this vessel would have arrived in Cardiff around the 1st of February, 1920, and the time is too remote.

Mr. MANNON.—Q. The time that you were in Cardiff in May of 1919, were there any floating mines there or thereabouts, that you saw? [106]

Mr. GRAHAM.—The same objection.

A. I did not see any on my voyage.

Mr. MANNON.—Q. That was the last time you were in Cardiff?

A. That was the last time I was in Cardiff.

Q. Now, when, prior to February of 1920, were you last in Rotterdam with your ship?

A. I went there five days after the armistice for orders, and then I got orders, and I had to go back to St. Nazaire to load flour for the Food Administration, that is, when I went to St. Nazaire.

Mr. GRAHAM.—I object on the ground it is also too remote. In this case the record shows the vessel arrived here sometime in the middle of February, 1920.

Mr. MANNON.—Can you fix approximately the time, as nearly as you can, that you were in Rotterdam the last time prior to February, 1920?

A. Prior to 1920? 1920 I was running for my own company. I am talking about the Army time now.

Q. I want to get the last time you were in Rotterdam before February, 1920, as near as you can remember. A. The latter part of March, 1919.

Mr. GRAHAM.—The same objection, too remote.

(Deposition of Walter Mervyn Strong.)

Mr. MANNON.—Q. What was the condition of the entrance to Rotterdam?

A. I could tell by my naval orders.

Q. What was the condition of the entrance to Rotterdam with regard to floating mines the last time you were in there in March, 1919?

Mr. GRAHAM.—The same objection.

A. They had not cleaned up the mine fields, the British mine fields, at the Straits of Dover, that is, in the southerly part.

Mr. MANNON.—Q. By the way, where have you been running to in the North Sea since February, 1920, if anywhere? [107]

A. Since then, up to date?

Q. Yes.

Mr. GRAHAM.—I object on the ground it is irrelevant or immaterial where he has been running since the loss occurred.

A. I have been running to Antwerp, Rotterdam, Bremerhaven, Hamburg.

Mr. MANNON.—Q. What ship were you on, Captain?

A. In the latter part of February I was transferred from the "Kerowlee" and given command of the ship I have now.

Q. What is her name? A. "Kermit."

Q. What year was it, February of what year?

A. I had to wait about two weeks for this ship to come in, and I took charge of this ship on March 5, 1920.

Q. What year? A. 1920.

(Deposition of Walter Mervyn Strong.)

Q. March 5, 1920? A. Yes.

Q. In what trade have you been operating with this ship since March, 1920?

A. We went on the New York-Hamburg trade, I made two trips, and then went in the Hamburg-South American trade.

Q. So that you have been running into the North Sea and into Hamburg practically every trip since then? A. Every trip since then.

Q. When did you arrive at San Francisco?

A. This voyage?

Q. Yes.

A. I am southbound; I arrived here this morning southbound.

Q. When are you leaving San Francisco?

A. I am probably leaving to-morrow night for Hamburg, via Los Angeles.

Q. Now, Captain, when was the mine field planted in the North Sea?

Mr. GRAHAM.—Objected to on the ground that the captain does not know when they were planted; he did not plant them himself, or did not take part in planting any. [108]

A. I did not take part in planting any; no.

Mr. MANNON.—Q. You were running into the North Sea before the war, weren't you?

A. No, not before the war.

Q. Was it during the war that you first began to operate in the North Sea?

A. Only temporarily across the Straits one trip. The most of my trade was cross channel.

(Deposition of Walter Mervyn Strong.)

Q. At that time, were there mines where you were traveling across the North Sea?

Mr. GRAHAM.—He has not testified he was traveling across the North Sea. He says he was crossing the channel.

A. You can't call that the North Sea where I went to cross the Straits of Dover.

Mr. MANNON.—Q. That is the southerly entrance to the North Sea? A. Yes.

Q. Now, you have stated, Captain, that in 1919, when you were on your voyages and entered the North Sea, you were stopped at the Downs. What did you stop there for?

A. For the examination boat, for notice to mariners with regard to the mine fields.

Q. Regarding mine fields where?

A. In the North Sea.

Q. If you know, who maintained that station that you stopped at? A. The British Admiralty.

Q. What class of information, generally speaking, did you get on those voyages, what kind of information?

A. You used to get a chart, a little chart, with buoys, and your courses, and then instructions to masters, advices on traveling through the mine fields.

Q. Now, you say they told you of the buoys. What were the buoys for, do you know?

A. When we got up to the mine field, they had the swept channel buoys.

(Deposition of Walter Mervyn Strong.)

Q. That is to say, you followed the course of the buoys?

A. Followed the course of the buoys. [109]

Q. As a matter of fact, that was the way the entrance was shown into Hamburg?

A. Into Hamburg, yes.

Q. How wide was that swept channel in 1919, if you know?

A. In 1919, the buoys were supposed to be the center, and they swept about a mile and a half each side.

Q. That mile and a half was kept free of floating mines? A. It had been swept free.

Q. And outside of that, there was danger of floating mines?

A. That is, it was free of moored mines.

Q. You spoke of taking on a German admiralty pilot during 1919 on your voyages from the North Sea, going into the River Elbe, and Hamburg. What did you take that pilot on for, Captain?

A. Through the German mine field.

Q. That is to say, he knew where the mine fields were, and you did not, as captain of the ship?

A. Yes. That was free, that was a German admiralty pilot.

Q. Now, were there any vessels lost in the North Sea on account of floating mines, after the war, to your knowledge?

Mr. GRAHAM.—I object to that on the ground it is only hearsay.

(Deposition of Walter Mervyn Strong.)

A. We lost one of our own ships, the company lost one of our own ships while it was over there.

Mr. GRAHAM.—The same objection.

Mr. MANNON.—Q. What was the name of the ship, Captain? A. The "Kerwood."

Q. When was the "Kerwood" lost?

Mr. GRAHAM.—The same objection.

A. That was in the winter of 1920.

Mr. MANNON.—Q. About what time?

Mr. GRAHAM.—The same objection, and on the ground that if [110] the captain was not on board the vessel, it is purely hearsay, and seeking by indirection to put into the record something that could not otherwise be directly put in by this witness.

A. She was a ship that followed me on this schedule.

Mr. MANNON.—Q. Followed you when you went in in December, 1919?

A. We had these eight ships on that run; we started with these eight Austrian ships they all began with "Ker"; she was the one following me.

Q. How far was she behind you in time Captain, if you know?

Mr. GRAHAM.—May it be stipulated that the same objection may run as to all of this line of questions?

Mr. MANNON.—Yes.

A. I can't remember now what kind of schedule we did keep.

Q. Now, how do you know the "Kerwood" was lost?

(Deposition of Walter Mervyn Strong.)

A. I saw her captain, and he told me about it.

Mr. GRAHAM.—The same objection, all the way through.

Mr. MANNON.—Q. What is this map that you have produced here now, Captain? Can you identify that for the purpose of the record?

A. North Sea, Southerly Sheet.

Q. At the bottom, here, will you read that notation into the record?

A. Extensive corrections, May, 1918, to August, 1920.

Mr. MANNON.—In connection with the testimony of this witness, we offer this map in evidence and ask that it be marked Libelant's Exhibit Strong 3.

Mr. GRAHAM.—For what purpose is the map being offered in evidence?

Mr. MANNON.—We offer it for the data particularly that is published on it, in connection with the wrecks that I will have the witness point out.

Mr. GRAHAM.—In the form of the offer as it is made, the [111] chart being offered for the sole purpose of indicating the wrecks thereon designated, will you state before examining the witness whether the marks of the wrecks are marks that have been put on the chart by the witness, or by whom they have been put on the chart?

Mr. MANNON.—We do not want it to be considered that we are making the offer solely for the purpose of showing the wrecks. I want to ask this witness about the wrecks that are indicated on it,

(Deposition of Walter Mervyn Strong.)

and we offer the map for all of the information which is given in connection with the North Sea; I propose, however, to ask this witness about the wrecks thereon indicated.

Mr. GRAHAM.—The reason I asked the question was to point the objection we have made to the witness' testimony with reference to what, on its face, could only be hearsay, and I would like to know whether the marks of the wrecks that are indicated upon the chart are marks of wrecks that have been put on by the captain, himself, or by whom.

Mr. MANNON.—I think not. I think they are put on by the authorities who issue the chart.

(The chart was marked Libelant's Exhibit Strong 3.)

Mr. GRAHAM.—Q. Can you tell us, Captain?

A. I can show you the difference.

Q. Can you tell us who made the marks of the wrecks, how the wrecks are indicated on the chart?

A. I could show you the difference between my corrections and the printer of the chart.

Mr. MANNON.—Q. Then printed on the chart are points which designate places where wrecks have occurred?

A. For instance, the chart is sent ashore and corrected every trip. For instance, the chart is published and every wreck is put on, but as they keep coming in, you send the chart ashore and get it [112] corrected.

Q. Who corrects them?

A. This one has been in to the office in Hamburg.

(Deposition of Walter Mervyn Strong.)

and he puts them in ink, and the Hydrographic Office puts on some; when a light is changed, or a buoy is changed, they take it off; you can tell the difference between my correction and theirs.

Q. Now, Captain, will you point out in the North Sea, near to Terschelling Island, any wrecks that are indicated on the map as published?

Mr. GRAHAM.—I object to that on the ground it is immaterial, irrelevant and incompetent.

Mr. MANNON.—It is merely to explain the map.

Mr. GRAHAM.—The map will speak for itself.

A. You see, all of these marks are original; you can see that.

Q. In and about Terschelling Island, will you point out a particular wreck?

A. That is the original print, there is a mark.

Q. Just a minute, Captain. I have got to get these things one at a time.

Mr. GRAHAM.—I object to all of this testimony as irrelevant. The map will speak for itself; if the map is introduced for the purpose of showing the wrecks which are there marked, the captain's testimony is not relevant.

Mr. MANNON.—I think Mr. Graham is correct about that. What I want to do is to have the witness point out the different wrecks.

Mr. GRAHAM.—The captain has not testified he has seen any of these wrecks shown on the map, or that he knows anything about them.

The WITNESS.—I saw that buoy every trip

(Deposition of Walter Mervyn Strong.)

up until recently; I do not see it now. This is the "West Arrada."

Mr. MANNON.—Q. When was the "West Arrada" lost? [113]

A. That was in the winter of 1920.

Mr. GRAHAM.—I object on the ground it is hearsay.

Mr. MANNON.—Q. What does the map show with regard to that?

Mr. GRAHAM.—I object on the ground it is irrelevant. The map will show for itself.

A. It shows its charted position when the chart was published.

Q. Does it show the cause of the loss?

A. No, it does not.

Mr. GRAHAM.—I object on the further ground that there is no indication upon the chart as to the date or dates when the wrecks occurred, and that on the face of the chart offered, dated, as it is, September 17, 1920, the Court could not draw any conclusions from the chart that would be in any way within the issues of the case, too remote in time, and not connected.

Mr. MANNON.—Q. Now, refer to the map that has been offered in evidence here as Libelant's Exhibit Strong 1: Will you state to what extent, if at all, you have relied upon that map in navigating your own ship in the North Sea and into Hamburg?

A. I did not navigate the ship by that. That was a guide.

(Deposition of Walter Mervyn Strong.)

Q. What did you use it for?

A. I used it as a guide through the mine fields, but particularly for these buoys.

Q. So that this particular chart in question is one that you, yourself, have used? A. I have used.

Q. In making your way through the North Sea with a ship? A. Yes.

Q. And you used it particularly to discover the location of the mine fields and to avoid them?

A. And to avoid them, yes, and we also plotted these from the hydrographic chart onto our own chart.

Q. When you say you plotted these, what are you referring to, Captain?

A. We put these buoys on; occasionally they drift, and then in the notice to mariners that come out again, they say the [114] buoys have drifted so far off, and we plot them on our own chart.

Q. What do you have to do with getting the buoys in the right place in going through the mine fields?

A. When we get the latest notice we correct our charts to where they are; we have got to run through them.

Q. You correct your own charts?

A. Yes; sometimes we go by in the foggy weather and we do not find them.

Q. Now, the first time in 1919 that you went through the North Sea, will you indicate on this chart, Strong's Exhibit 1, where you went with reference to the mine fields, and into the Kiel Canal?

(Deposition of Walter Mervyn Strong.)

I want you to indicate this only with regard to the mine fields that are indicated in pink on the chart.

Mr. GRAHAM.—What is the date of that?

Mr. MANNON.—That is the voyage to Danzig he made about April, 1919.

Mr. GRAHAM.—I object on the ground it is too remote.

A. From the Downs, where I got my latest instructions from the admiralty examination boat, and boarded by a British pilot, entered Edinburgh Channel and came out the Black Deep, coming up to Orford Ness, and there the British pilot left; from Orford Ness we followed the swept channel, down to Hook off Holland, and from the Hook off Holland I followed the Dutch coast about four miles off the coast up to Ymuiden, and from this position we left the coast and shaped a course for Haaks Lightship, and from Haaks Lightship we run for buoy No. 6, the southwestern entrance of the German mine field, and then followed the buoyed channel up to South Dogger Bank Lightship, and there we met the German cruiser, and they put an admiralty pilot aboard, and we were steering northeast, approximately, up to No. 5 gas buoy, following the swept channel, and from No. 5 buoy we steered a [115] southeasterly course down to Heligoland, where the admiralty pilot left us, and the Elbe River pilot came aboard, and took us into the Kiel Canal.

Mr. GRAHAM.—We move that the answer be stricken out as not being material to any of the

(Deposition of Walter Mervyn Strong.)

issues in this case, entirely incompetent, irrelevant, and what courses the captain pursued in any voyage in April, 1919, can in no way help the Court in any way to solve the issues of this case.

Mr. MANNON.—The next time, the second voyage that you made through the North Sea and into the Elbe River, you went up through the Straits of Dover, and where did you go at that time?

A. That was running back for my owners, through the Downs.

Mr. GRAHAM.—Q. When was this voyage that you now are about to give us?

A. The one I came back on now?

Q. Yes.

A. That is the one I made back for the Kerr Line, the middle of September, I left New York, and in the middle of October, 1919, I was in Hamburg.

Mr. GRAHAM.—I would like the same objection entered to that question that we have entered to the other question.

Mr. MANNON.—Yes. Proceed with your answer.

A. On my second voyage in October through the North Sea I ran up to the swept channel off Terschelling, and at the entrance to Buoy No. 6 we met the admiralty pilot, and they put a pilot on board, and he took me to the Elbe River.

Mr. GRAHAM.—I move to strike the answer out on the same grounds on which we made the other motion.

(Deposition of Walter Mervyn Strong.)

Mr. MANNON.—Now, from Buoy No. 6 will you describe your course into the Elbe, Captain?

A. I was piloted by the German pilot through the swept channel around Terschelling and down to the Gas Buoy off Norderney, and to the Elbe. [116]

Q. About what direction was it you went in going from No. 6 Buoy?

Mr. GRAHAM.—The same objection.

A. From Buoy No. 6 I was steering approximately northeest up to Buoy 9, through the swept channel, and from Buoy D at the turn, easterly courses into the Elbe.

Q. What you have referred to as No. 6, is that marked?

A. It don't show on this one, here; there used to be a 6; there is where they began cutting them off. You see, here, 1, 2, 3, 4, and down to 5—they have cut that off.

Q. What is the difference between that course you took into the Elbe and the course you took into the Elbe earlier the same year?

A. Earlier the same year I took the Dogger Bank.

Q. You took a course that is much more northerly? A. Much more northerly.

Q. What was the reason for the change in course?

A. They had not started sweeping operations yet.

Q. They had opened the channel north of Terschelling Island about the time of your second trip in October, 1919?

A. These channels—that is the German mine field there; the Germans had never planted any mines

(Deposition of Walter Mervyn Strong.)

in here; they were British, and they had to sweep them.

Q. Now, you are indicating the course on the chart that you took on your trip of October, 1919, are you?

A. Yes; you see, this is the German mine field.

Q. That is the space that is indicated on the chart in pink, the German mine field?

A. Yes; the Germans came over and laid mines in the British waters, and the British came over into the Germans' and laid them here, and they would sweep, and the next morning it would be the same thing; but the only trouble through here was the floating mines. [117]

Q. That is, the trouble with the floating mines was in the course north of Terschelling Island shown on the chart? A. Yes.

Q. When you made the trip into the North Sea and into the Elbe in December, 1919, you took the same course that you took in October, 1919, didn't you? A. Yes, the two Kerr Line trips.

Q. Then when you came out of Hamburg with your ship in 1920, about the middle of January, as you testified, you came out on the course that lays just north of Terschelling, didn't you?

A. Yes.

Q. Were there buoys all along that course?

A. Each trip they had been cutting them off more.

Q. What do you mean by "cutting off more"?

A. This mine field used to come away down to here; they cut off this first, and cut off this, and

(Deposition of Walter Mervyn Strong.)

chopped this off, and then they had some more off, they kept cutting them off.

Q. That is to say, on your first voyages in 1919, into the North Sea, the mine fields were much more extensive, but they were being cleaned up?

A. Yes.

Mr. MANNON.—That is all.

Cross-examination.

Mr. GRAHAM.—You testified that in December, 1919, you made a trip in and out of Hamburg, and that you followed the coast of Holland past Terschelling all of the way up to the mouth of the Elbe, is that correct?

A. No, you have got that a little twisted. That was not December.

Q. That was not in December? A. No.

Q. What was the route that you took in December?

A. In December I took the course around Terschelling; you are talking of the one in April or May, when I went to Danzig, when I followed the coast of Holland. [118]

Q. Give us the route that you took up the channel into the mouth of the Elbe in December?

A. In December?

Q. Yes.

A. From the Straits of Dover I ran over to make the Haaks Lightship, and to come up here to make No. 6 at the entrance of the swept channel, and there the admiralty pilot piloted me through.

Q. How far north did he take you?

(Deposition of Walter Mervyn Strong.)

A. He didn't take me north, he just took me, after we got through that mine field off Terschelling, that swept channel, and he took us right straight through.

Q. You followed the shore from then on to the mouth of the Elbe?

A. We never seen any shore, it was all foggy that time of the year.

Q. How far off shore were you?

A. I will look at the chart.

Q. About how many miles off shore, approximately?

A. Approximately ten or fifteen miles; off Terschelling,—

Q. Then did you follow the coast from then on up to the mouth of the Elbe?

A. No, you follow the buoys of the swept channel.

Q. That was about ten miles offshore all the way up to the mouth of the Elbe?

A. No; off Terschelling it was off about 25 miles, and then it comes in at Norderney, to about ten miles of the shore line, eight or ten miles of the shore line.

Q. That was all swept in there?

A. That was swept in there.

Q. Free of mines?

A. Free of moored mines.

Q. Did you ever see any floating mines in there during this trip? A. Yes.

Q. Where did you see them?

A. I saw them all over the North Sea.

(Deposition of Walter Mervyn Strong.)

Q. I am asking you where you saw floating mines on this particular route?

A. The center of them was Borkum Reef Lightship.

Q. Where is that, approximately?

A. Borkum Reef, that is where [119] it is.

Q. Where, in reference to Terschelling, say?

A. It is north of Borkum Reef—it is northeast of Terschelling—it is between Terschelling and Norderney.

Q. That is after you pass Terschelling, is it not?

A. Yes.

Q. Did you see any floating mines before you got to Terschelling on this trip?

A. On this trip, no.

Q. How many mines did you see off Borkum Reef on that trip?

A. Off of Borkum Reef that trip I had that northwest gale.

Q. This was the trip in December, 1919?

A. That is the trip I had a northwest gale, and I began to run into them at Borkum Reef and from there to Norderney Lightship, I must have seen about eight that trip.

Q. Can you state with any degree of accuracy that you saw eight or ten?

A. Say eight, that is nearer to it.

Q. How far off was the nearest one of those eight?

A. About six o'clock that night, about four feet from No. 2 hatch, when I saw it.

(Deposition of Walter Mervyn Strong.)

Q. You did not see any around Terschelling Island, at all?

A. I would not say then; it was just getting dark.

Q. Did you see any floating mines around Terschelling Island on this trip?

A. Not that trip, the wind was northwest, and they would blow further up in the bight.

Q. In other words, with a northwest wind they would blow up in the bight, and there would be very few around Terschelling at all, floating mines?

A. There would be less than there would be in the bight.

Q. So that in your estimation, then, your greatest danger was off the mouth of the Elbe River?

A. No, you are out of it then.

Q. Where was it, Borkum Reef?

A. From Borkum Reef to Norderney— [120] really, from Terschelling to Norderney was the worst place.

Q. You say you saw about eight mines.

A. About eight mines that trip.

Q. You could not confine it to any specific number? A. No, that is a long time ago.

Q. Now, as a matter of fact ,aren't you just guessing about how many mines you saw?

A. Well, one watch would see two or three, and the next watch see five or six.

Q. Did you see any, yourself?

A. Personally, yes, I did not leave the bridge.

Q. Have you any record of having seen any?

A. No, not now.

(Deposition of Walter Mervyn Strong.)

Q. Just your memory? A. Just my memory.

Q. It is a pretty long time ago, is it not?

A. It was that time.

Q. Your memory is not very clear on that, is it?

A. I will never forget them, you never forget your feeling there.

Q. What feeling was it that you will never forget, the mines?

A. Running through them in the night-time.

Q. Were you ever on a ship that ran into a floating mine?

A. Not hitting one, no.

Q. Did you ever run into one? A. No.

Q. Wasn't that route up the channel and past Terschelling Island, which you have just described, up to the mouth of the Elbe River pretty well used at that time by ships going into Hamburg?

A. No, it was not.

Q. Didn't you testify that that route was opened up, and that you took a route very similar to that in September of 1919?

A. No, you are too far back. I only left New York then.

Q. When did you make this second trip that you testified about?

A. The second trip, I arrived in Hamburg either December 22 or 23. [121]

Q. When did you make this third trip that you have testified about, the trip that we have been calling the December trip.

(Deposition of Walter Mervyn Strong.)

A. Hold on now; I am calling that second trip the second trip of the Kerr Line; that was my third trip in.

Q. I want to know did you make a trip in there in September? A. Not in September, no.

Q. When was that trip then?

A. In October I was in the Heligoland Bight, I was up in the North Sea.

Q. Did you see any floating mines on that trip?

A. Yes.

Q. Where did you see them?

A. That trip I met them further out.

Q. Further out in the channel, you mean?

A. Yes.

Q. That is in the southern part of the North Sea?

A. No, that was at the entrance; I did not see so many the first trip as I did the second trip.

Q. This second trip, is that the December trip?

A. That is the December trip.

Q. You saw more that trip?

A. Yes; from the gale, which would break them adrift.

Q. You ran into a northwest gale, you say?

A. I had a northwest gale, yes.

Q. Have you ever been up in that region in January or February?

A. I came out of there in January.

Q. When did you pass Terschelling Island, in January?

A. That was about the middle of January.

(Deposition of Walter Mervyn Strong.)

Q. What is the prevailing wind about that time in that area?

A. Well, a gale comes up and passes over, and it is all according to the wind, north or south, the direction of the wind.

Q. Is it a northeast or southeast wind, or what?

A. The northwest wind is your worst wind.

Q. Is that the prevailing wind in January?

A. The northwest gale, [122] yes.

Q. What is the prevailing wind in February?

A. All the winter months they have northwest gales.

Q. Have you ever been up there in February?

A. Yes.

Q. When were you there in February?

A. I have been running there ever since.

Q. Since the war? A. Yes.

Q. Since this period you spoke about?

A. Yes.

Q. After your December trip, when was your next trip up there past Terschelling?

A. When I came out in January.

Q. When was your next trip going into Hamburg past Terschelling?

A. The latter part of April I went into Bremerhaven.

Q. You took about the same route on that trip, this April trip, that you took in December?

A. The mine fields had been cleaned up more, and it was wider, but I ran the same way.

Q. Did you see any mines on that trip?

(Deposition of Walter Mervyn Strong.)

A. I saw about four.

Q. Where did you see those mines?

A. Up in the mine fields, floating mines.

Q. Coming out of Hamburg during the month of January was there heavy trade going on that particular route, past Terschelling, up into the Elbe, and out of the Elbe?

A. No, there was no German shipping business, the Germans didn't have any ocean-going ships at that time, they were operated by American shippers, and there were a few British ships.

Q. Did you ever hear of any ships being sunk from running into floating mines during the months of January and February in that area?

A. We lost one of our own ships, the "Kerwood."

Q. When was the "Kerwood" lost?

A. I have got it on the chart, here.

Q. Do you know of your own knowledge?

A. Of my own knowledge, [123] off Terschelling, to the north of Terschelling.

Q. When was she lost?

A. It was in—I would not say if it was January or February, 1920.

Q. You don't know?

A. One of those trips; she followed me; she was the next trip following me.

Q. You don't know how she was lost?

A. She hit a mine.

Q. What kind of a mine?

A. A floating mine.

Q. Do you know?

(Deposition of Walter Mervyn Strong.)

A. Well, it was in the night-time.

Q. As a matter of fact, you don't know whether she hit a stationary or a floating mine?

A. I saw the crew when she came in.

Q. Did the crew see the mine?

A. No, but they felt it.

Q. Could they tell whether it was a floating or stationary mine?

A. I don't know, I was not there.

Q. In regard to the trade you were in when you were operating for the Kerr Line, you were in the regular freight service, weren't you?

A. New York-Hamburg Line.

Q. What other ports did you call at on the continent?

A. In 1920 we only went into Hamburg.

Q. Just Hamburg?

A. Coming out on the January trip homeward bound, I stopped at Dartmouth and Bristol Channel for Bunkers.

Q. What did you do going in in 1919?

A. In 1919 I had bunkers enough to come home.

Q. Going into Hamburg, what ports of call did you make in 1919? A. Only Hamburg.

Q. You were only going to Hamburg all of this time? A. Yes.

Q. The "Kerwood" is the only ship that you know of that was lost?

A. No, the "West Arrada."

Q. You don't know anything about the wreck, other than what is shown on the chart, do you?

(Deposition of Walter Mervyn Strong.)

A. No.

Q. So that if I took the chart and read the names off I would [124] get just as much information as you are giving me as to the wrecks?

A. Yes, but I know where they are, I have been running by the buoys.

Q. You have not any positive knowledge of your own how any of these wrecks were caused? You don't know how they happened?

A. Yes; this "West Arrada," or whatever they call her, by the notice to Mariners, she hit a mine.

Q. You don't know that?

A. Yes, I read it.

Q. You don't know any more than you read there, do you? You don't know whether it was a floating mine or a stationary mine?

A. It says "floating mine."

Q. You don't know whether it is true, or not?

A. You can go in the Hydrographic Office and look it up.

Q. Going into Hamburg, did you always take a pilot in these 1919–1920 trips?

A. The first voyage for the Kerr Line in 1919, I took the free pilot.

Q. That is, free German pilot? A. Yes.

Q. What about the British pilot?

A. I only took a British pilot the first trip when I came up from Dover, up through the Sands.

Q. In the December, 1919, trip, you did not take a German free pilot then?

(Deposition of Walter Mervyn Strong.)

A. No, I went through without one; they discontinued that.

Q. You did not take a hired pilot?

A. I took a hired German North Sea pilot out.

Q. That is, coming back from Hamburg to the United States? A. And left him at Dover.

Q. But going in, you did not take a pilot?

A. No, I did not take any in.

Q. Why didn't you take a pilot in there? Did you consider it safe to go in without a pilot?

A. I had not made an arrangement for one there. [125]

Q. Where would you normally have picked up a pilot?

A. I could probably have picked up a British pilot, but the first trip I took a British pilot, I took him up through the Sands, I thought I would get a little sleep going across, but we had an argument there, over the price, and I finished him right there.

Q. So that, as a matter of fact, whether you ran with or without a pilot did not make much difference to you, if the price was high you would not take one?

A. No, but we had a dispute, there was a regular, fixed rate.

Q. But I say, if it is above that price you would not take one? A. No.

Q. You considered it was safe enough to run through there without a pilot?

(Deposition of Walter Mervyn Strong.)

A. No, I did not say that. First off, I was mighty glad to get one.

Q. That was in April, 1919?

A. In April, 1919, that was new, that was the first time I had been there, and in October I was glad to get him; that was the first time through the new swept channel.

Q. After they had this channel newly swept for some months, that is up to December, when you made this latter trip, it was considered fairly safe?

A. The company discontinued the pilotage.

Q. They continued it to when?

A. To May or June.

Q. 1919? A. 1920.

Q. You just testified you didn't take a pilot in December, 1919.

A. One way, but I was allowed to.

Q. I appreciate you were allowed to, but you did not take one; you did not think it was necessary to take one, did you?

A. I took the owner's responsibility.

Q. You thought you could get along safely without one?

A. Sometimes you get sore and you do things—you do it anyhow. [126]

Q. What was the practice of masters of these other ships about December, January and February?

A. They would take the British pilot over and pay all their transportation and board until they landed back.

(Deposition of Walter Mervyn Strong.)

Q. That is, take them from England up to Hamburg, or wherever they were going to go?

A. Yes.

Q. That was the universal custom?

A. That was the universal custom.

Q. What were the rates, do you know?

A. They did not all have the same rates, the German rate was 60 pounds, he to furnish his own transportation back.

Q. You testified a little while ago as to floating mines, whether they were in one given area or another area depended largely on the wind, did you not? A. On the wind, yes.

Q. The wind did not generally blow northeast or northwest, did it? A. No.

Q. It would blow northeast one day and maybe northwest the next day, and so on? A. Yes.

Q. You would find the floating mines first in one location and then maybe in another location?

A. Yes, occasionally you might find one, but the bulk of them would be up around this Terschelling mine field; it would depend on where the shore was, and whichever way the wind had been blowing the last day or so.

Q. Who was sweeping around Terschelling?

A. The Germans.

Q. Did you run into any Dutch crews sweeping that field? A. Not up there, no.

Q. You never saw any?

A. The trouble is, you could not tell whether they were Dutch or German.

(Deposition of Walter Mervyn Strong.)

Q. You knew they were sweeping?

A. I knew they were sweeping. [127]

Q. And that it was apparently safe?

A. Safe from moored mines, but not from floating mines.

Q. What were they sweeping, moored or floating mines?

A. They were all sweeping for moored lines.

Q. What did they do with the floating mines?

A. When they saw them they would shoot them up.

Q. So they were actually out for floating and moored mines, weren't they?

A. Yes, to destroy anything they could see.

Q. Did you keep any written data on these mines that you saw? A. No.

Q. You never did?

A. In the log-book, we used to put them in.

Q. You have not got any of those logs accessible? A. Yes, the Kerr Line has got them.

Q. They have got them?

A. They have got them.

Q .You don't remember what date you saw any of these mines? A. No.

Q. You just recollect that you did see mines?

A. I remember I did see mines.

Q. You are not positive?

A. In the Navy logs, they were more apt to be put in there.

Q. This December trip, you just remember that you did see some mines? A. Yes.

(Deposition of Walter Mervyn Strong.)

Q. You don't remember definitely where they were, or how many there were? A. No.

Mr. GRAHAM.—That is all.

Redirect Examination.

Mr. MANNON.—Q. You seem to have had a little difficulty in distinguishing these various trips that you made. As I understand you, you made the first trip through the North Sea and into the Kiel Canal, and then around to Danzig about April of 1919? [128]

A. April, that is when I went up and came back in May.

Q. And you came back the same way?

A. Yes, I was in a Naval ship.

Q. Then you made another trip out of New York in the "Kerowlee," leaving New York about September, 1919? A. About September.

Q. That put you into the North Sea about October, around there? A. Yes.

Q. At that time you went into Hamburg?

A. Yes.

Q. And then there was a third trip that you made that you have been testifying about when you were in the North Sea and went into Hamburg some time in December: That is correct?

A. In December, the 22d or 23d, I don't remember which.

Q. And then you came out of Hamburg on that trip and back through the North Sea, leaving Hamburg about January 15?

(Deposition of Walter Mervyn Strong.)

A. The middle of January, I could not say just exactly.

Q. That is January 15, 1920, or the middle of January, 1920? A. Yes.

Q. State, if you know, whether the trip that you made to Hamburg out of New York that you have been describing here is the same or a different trip to one that would ordinarily be made by a vessel going through the Panama Canal to Hamburg?

Mr. GRAHAM.—I object on the ground that the captain has not testified he ever went through the Panama Canal. Has he testified he made a trip from here to Hamburg, or any other continental port?

The WITNESS.—I stated I have been running there ever since; we are running practically the same route. We shape our course closer to Terschilling, we run from Haaks Lightship to Terschelling and Borkum Reef and Norderney right to the Elbe.

Mr. MANNON.—Q. What I want to find out from you, Captain, is, if a vessel like your vessel, which was running in 1919 [129] through the North Sea out of New York would take the same or a different course, so far as the North Sea is concerned, that a vessel would take through the Panama Canal up to Hamburg through the North Sea? A. It makes no difference.

Mr. GRAHAM.—Objected to on the ground it

(Deposition of Walter Mervyn Strong.)

is hearsay; he did not testify in 1919 that he ever made the trip through the Panama Canal.

A. That is the same thing, the Straits of Dover are practically a starting place up in the North Sea.

Mr. MANNON.—Q. Then the course of a vessel from the Panama Canal into Hamburg, either in 1919 or at the present time, would require you to go through the Straits of Dover, would it?

A. Yes.

Q. So that the course a vessel from the Panama Canal would take into Hamburg either in 1919 or now would be the same as a vessel would take out of New York? A. Practically the same. [130]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

I certify that, in pursuance of the stipulation of counsel, on Monday, December 15, 1924, before me, Frank L. Owen, a notary public in and for the city and county of San Francisco, State of California, at the offices of Messrs. McCutchen, Olney, Mannon & Greene, in the Balfour Building, in the city and county of San Francisco, State of California, personally appeared Walter Mervin Strong, a witness called on behalf of the libelant in the cause entitled in the caption hereof; and J. M. Mannon, Jr., Esq., and Edwin S. Pillsbury, Esq., appeared as proctors for the libelant, and Ira S. Lillick, Esq., and C. G. Graham, Esq., appeared as proctor for the respondent, and the said

witness, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in said cause, deposed and said as appears by his deposition hereto annexed.

I further certify that the deposition was then and there taken down in shorthand notes by E. W. Lehner, and thereafter reduced to typewriting; and I further certify that by stipulation of the parties, the reading over of the deposition to the witness and the signing thereof were expressly waived.

Accompanying said deposition and annexed thereto and forming a part thereof are Libelant's Exhibits Strong 1, 2 and 3, introduced in evidence on the taking of the deposition, and referred to and specified therein.

And I do further certify that I have retained the said deposition in my possession for the purpose of delivering the same with my own hand to the Clerk of the United States District [131] Court for the Northern District of California, the Court for which the same was taken.

And I do further certify that I am not of counsel nor attorney for either of the parties in said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

IN WITNESS WHEREOF, I have hereunto set my hand in my office aforesaid this 24th day of December, 1924.

[Seal] FRANK L. OWENS,
Notary Public, in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed December 29, 1924. [132]

[Title of Court and Cause.]

IN ADMIRALTY—No. 17,693.

Before Hon. FRANK H. KERRIGAN, Judge.

TESTIMONY.

Monday, December 29, 1924.

Counsel Appearing:

For Libelant: Messrs. McCUTCHEN, OLNEY, MANNON & GREENE; J. M. MANNON, Jr., Esq., and FARNHAM P. GRIFFITHS, Esq.

For Respondent: IRA S. LILLICK, Esq., CHALMERS GRAHAM, Esq., J. A. OLSEN, Esq., J. J. GEARY, Esq.

Mr. MANNON.—Your Honor, there are three actions involved here; I suppose they could be consolidated.

Mr. LILLICK.—I see no reason why these cases should not be consolidated.

Mr. MANNON.—There will be some evidence,

I presume, that will apply to each of these cases individually. There are separate libels and there are separate answers. I presume there will be separate judgments eventually. I presume the three may be tried together, and the evidence applicable to a particular case can be applied to that particular case. [133]

Mr. LILLICK.—Instead of having an order of consolidation we can try the cases together, and then, by stipulation, that portion of the testimony that may be applicable to all of the cases will apply to them, and then, as there will need to be separate judgments, any special testimony applying to a special case can be put in in the order in which the cases appear on the calendar. Perhaps that would be a simpler way of treating them. We will not then have to duplicate the testimony.

Mr. MANNON.—Yes, I think that will be the best way.

The COURT.—That will be satisfactory to the Court.

Mr. MANNON.—I want to make a short statement in regard to these cases. All three of the cases are brought by cargo owners of the ship "West Aleta." The California Wine Association is bringing a proceeding here to recover some $642,000, the value of certain wine that it shipped to Cardiff, and also some that it shipped to Rotterdam.

Rosenberg Bros. & Co. bring a proceeding for

the value of certain rice which had been shipped by that concern to Rotterdam.

S. L. Jones & Co. have brought suit here to recover the value of 82 cases of nutmegs that had been shipped to Rotterdam, the value stipulated to being some $4,841.

The subject we will talk about in the case is deviation. It is stipulated here that that is the only ground of recovery. By deviation is meant that the ship started from San Francisco on bill of lading voyages, in the one instance to Cardiff, and in the other two instances to Rotterdam, whereas she had passed Cardiff and had passed Rotterdam and was on the way to Hamburg at the time she was wrecked; the ship broke in two and became a total loss.

The principle of deviation is, of course, thoroughly established. [134] Exceptions were filed to the various libels in these cases. Those exceptions were heard by Judge Partridge. They were based on the ground that the Shipping Board Emergency Fleet Corporation was not suable as such under the Act of June, 1920. Judge Partridge held that the Emergency Fleet Corporation was liable. In that holding he is supported by the Sloane Shipyards Case, decided by Judge Taft in the Supreme Court of the United States. It is now thoroughly established, both in this case and as a matter of general law, that the United States Shipping Board Emergency Fleet Corporation is in the position of any other ship owner or common carrier.

It is proper for me to say to the Court that a cargo case or cases—rather, two cases—of the same character as this one, have been tried before Judge Augustus Hand, in New York City, and recovery has been made by the cargo owner.

The "West Aleta" was one of the boats originally constructed for the Government, and was being operated, it appears, by Williams, Dimond & Co., as we claim, for the Emergency Fleet Corporation. She took on some cargo at Seattle, none of which, however, is involved in this case, then she came down to San Francisco, in December of 1919, took on some cargo here. The bills of lading involved in this case are dated in the last part of December, and along in the early part of January, 1920. She left here on January 6, 1920, and proceeded via the Panama Canal; then, without stopping, went past the entrance to Cardiff, Cardiff being on Bristol Bay in England, and past the entrance to Rotterdam, in the North Sea, Rotterdam being in Holland, and some 120 miles beyond laid up on the Terschelling Island, in the North Sea. Terschelling Island is one of the Dutch islands immediately off the coast of Holland.

The only basis of liability asserted here is that the ship [135] should have taken her Cardiff cargo, in accordance with her bills of lading, to Cardiff, and then she should have proceeded, in geographical order and in the normal order, to Rotterdam, and there discharged her Rotterdam cargo. Then, so far as these shippers are concerned, they would have had no further concern with the vessel. If she had Hamburg cargo, as

she did, then she should have proceeded to Hamburg. The libelants here say in two of the cases that certain of the goods had been originally destined out of San Francisco on the ship "Cockaponset," another vessel on this same line which had just been established, but there had been some failure or other intervening cause on account of which the goods were taken on board the "West Aleta."

It has been agreed between counsel that there is no difference between the cargo which was originally destined to go on the "Cockaponset" and the cargo which was to go on the "West Aleta," so that what we have to present to your Honor deals entirely with these goods which were shipped on the "West Aleta." The only basis on which we claim liability is that instead of the goods being taken in the straight course to Cardiff in the instance of the California Wine Association, and so far as the other goods are concerned, on a straight course to Rotterdam, stopping only, if at all, at intermediate points, the ship proceeded on a voyage to Hamburg. Without going into the law at this time, it is thoroughly established, we think, that if there were a deviation, then all of the protection of the bill of lading clauses is gone to the ship owner, and the ship owner—the common carrier, becomes an insurer of the goods during the course of the deviation; and if there were a deviation in this case at all, then we think that the Shipping Board Emergency Board Fleet Corporation is necessarily [136] liable.

In order to point out what the issues are in the case, one of the issues here is the same as the issue in the Eastern case, with regard to what the bill of lading provided concerning the so-called "liberty-to-call" clause; that is to say, a bill of lading usually provides, or frequently provides, that a vessel can call at certain ports; sometimes the ports are specified; sometimes a general clause is used. In this case, the "liberty-to-call" clause, which is pleaded as a defense, reads as follows, and with your Honor's permission I will read the first part of the bill of lading. We have agreed that this is the bill of lading.

> "Received in apparent good order and condition from California Wine Association at San Francisco, Cal. Marked and numbered as below (weight, quality, contents and value unknown) to be transported by the ship 'West Aleta,' now at or to arrive at the port of shipment to be carried upon said vessel or any other vessel operated by or on account of the United States Shipping Board Emergency Fleet Corporation, or the United States Shipping Board, with leave to sail with or without pilots, to transship to any other vessels operated by said corporation, or said board, or for its account, to lighter from vessel to vessel, and from vessel to shore, to transship either by rail, lighter or otherwise, to transfer to and from hulk, and to touch at any port or ports, in any rotation or order in, or out of, the customary route, and to call at any port or ports more than once, unto the port of Cardiff."

So that the defense that is pleaded is this clause, amongst others, and this clause will ultimately require your Honor's interpretation "to touch at any port or ports in, or out, of customary order, and more than once." [137] We shall have occasion to present the authorities eventually on that. Our contention is, and it was sustained in the Eastern case, that that clause is limited by bill of lading voyage. That is, the ports at which they were given permission to touch were only ports which lay between San Francisco or the Panama Canal and Cardiff, geographically. Of course, Hamburg was not one of those ports. That applies to the California Wine Association cargo. So far as the Rosenberg Bros. & Co. cargo is concerned, its destination was Rotterdam.

Amongst other defenses pleaded are the various limitations set out in the bill of lading; that is to say, there are clauses that in case of loss the amount of recovery shall be limited to a certain amount, so much per package or so much per short ton. I think there are three limitations of that character, all of which are set out in the pleadings.

Then there is the so-called "benefit of insurance" clause, by virtue of which, if the goods were insured, the ship owner was to secure the benefit of that insurance if he had to pay for the cargo. As to all of these clauses, our position is, and we think it is thoroughly sustained by the authorities, that the ship owner, if he deviates from his bill of lading course, is not entitled to the protection of any of these clauses, and that during the course of the deviation the ship owner is an insurer of the goods.

So that the issues in this case as we see them are the claim on the part of the cargo owners that this ship deviated and went in a way that she was not entitled, as a matter of right, to go; and that during the course of that deviation, while she was neither on the road to Cardiff nor on the road to Rotterdam, but had gone beyond those places, the vessel was lost; that she was lost during [138] the course of that deviation, and hence is liable for the value of the cargo. We have agreed on that value. The defenses, as we see them, or at least as they are pleaded, are the liberty-to-call clause, which we contend is limited to the voyage, and does not permit the ship to go beyond; and the various clauses in the various bills of lading which have to do with either the benefit of insurance of the values of certain packages or certain tonnage, all of which we think the cargo owner cannot take advantage of, for the reason that it becomes an insurer of the cargo during the course of the deviation.

I think I have told your Honor that this ship left San Francisco on January 6, 1920, and proceeded via the Panama Canal, and passing the entrance to the Bay of Bristol, where Cardiff is situated, passed through the Straits of Dover into the North Sea, passed the hook of Holland, where the entrance to Rotterdam is situate, and then was lost, I think on the 12th of February, early in the morning, 1920, on the sand-bank that puts off from Terschelling Islands, and that as a result of that all the cargo was lost.

Mr. LILLICK.—May I suggest, Mr. Mannon,

that we read to the Court the stipulation into which we have entered covering the facts?

Mr. MANNON.—Yes, I was just going to proceed to do that.

Mr. LILLICK.—I beg your pardon, Mr. Mannon, I though you were going to start in now with your formal proof.

Mr. MANNON.—We think that is our main proof in the case. Counsel have entered into a stipulation of facts in each of the three cases. The stipulation reserves the right to counsel on either side to object to the materiality or relevancy of the evidence, but, of course, not to the method of proof. In accordance with [139] counsel's suggestion, which I think is a very good one, I will read to your Honor the agreed statement of facts in one of these cases. I think perhaps first we had better offer this in evidence formally. I offer in evidence the agreed statement of facts in the case of S. L. Jones & Co., the same being marked as having been filed in this court November 20, 1924, and ask that that be marked Libelant's Exhibit 1.

I next offer in evidence the agreed statement of facts in the California Wine Association case, the same being marked as having been filed in this court November 20, 1924.

It will be agreeable to us, Mr. Lillick, to number these right through, without endeavoring to differentiate between the cases.

Mr. LILLICK.—I think that would be the simplest way.

Mr. MANNON.—Perhaps they had better be marked in each case, though. I think we will fol-

low that course. Likewise, we offer in evidence the agreed statement in the Rosenberg case. With your Honor's permission I will read the agreed statement of facts in the Rosenberg Bros. case. And, of course, by reading it right through I will not have waived any of my objections that I desire to urge. The same reservation, of course, will apply to counsel on the other side. In the Rosenberg Bros. case this statement of facts bears the caption of the court and cause, and then proceeds as follows:

[Title of Court and Cause.]

IN ADMIRALTY—No. 17,692. [140]

"AGREED STATEMENT OF FACTS.

"IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above-entitled cause that the following facts are true and that said facts shall be deemed proved at any trial or trials of said cause without the necessity of any evidence other than this stipulation, to wit:

"(1) That libelant heretofore and, to wit, on or about between the thirty-first day of December, 1919, and the sixth day of January, 1920, delivered in good order and condition at San Francisco, California, to respondent fifteen hundred (1500) sacks of rice for carriage, by the steamer 'West Aleta' as a common carrier of merchandise by sea, upon a voyage to Rotterdam, Holland, and delivery there in like good order and condition unto the order of said libelant. That respondent duly received said

fifteen hundred (1500) sacks of rice on board said steamer as such common carrier of merchandise by sea and agreed to carry the same by said steamer to Rotterdam, Holland, and there to deliver said rice as aforesaid.

"(2) That libelant heretofore and, to wit, on or about the fifteenth day of December, 1919, delivered in good order and condition at San Francisco, California, to respondent four thousand (4,000) sacks of rice, for carriage by the steamer 'Cockaponset,' as a common carrier of merchandise by sea, upon a voyage to Rotterdam, Holland, and delivery there in like good order and condition unto the order of said Libelant; that respondent duly received said four thousand (4,000) sacks of rice and agreed to carry the same by said steamer to Rotterdam, Holland, and there to deliver said rice as aforesaid.

"(3) That respondent failed to carry six hundred eighty (680) of said four thousand (4,000) sacks of rice by said steamer [141] 'Cockaponset' and said vessel sailed from San Francisco without having on board said six hundred eighty (680) sacks of rice. That thereafter respondent placed said six hundred eighty (680) sacks of rice aboard the said steamer 'West Aleta' for shipment to said port of Rotterdam, Holland.

"(4) That at the times herein mentioned the steamer 'West Aleta' was owned by the United States of America and was documented in the name of the 'United States represented by United States Shipping Board.' Prior to the time mentioned in the libel the respondent entered into contracts with

Messrs. Williams Dimond & Company for the management of said steamship, copies of which managing agreement and operating agreement are hereunto annexed and marked, respectively, Exhibit 'A' and Exhibit 'B.' During all the times mentioned in the libel said steamship was operated and managed under said agreements.

"(5) That the bills of lading issued with respect to the carriage of the rice described in paragraph (1) hereof were all in the form of Exhibit 'C' attached hereto, except as to date, quantity, description of goods and freight charges, and this shall be deemed sufficient showing of all of said bills of lading as requested by respondent.

"(6) That the bill of lading issued with respect to the carriage of the rice described in paragraphs (2) and (3) hereof was in the form of Exhibit 'D' hereto attached, and this shall be deemed sufficient showing of said bill of lading as requested by respondent.

"(7) That the steamship 'West Aleta' loaded and carried approximately two thousand six hundred thirty-four (2,634) tons of cargo destined for Cardiff, Wales, one thousand five hundred three (1,503) tons of cargo destined for Rotterdam, Holland, [142] and six hundred sixty-one (661) tons of general merchandise destined for Hamburg, Germany. Said Cardiff and Rotterdam cargo was chiefly barrels of wine, brandy and oil, and said cargo was in the main stowed in the lower holds and the Hamburg cargo was principally

stowed on top of said Cardiff and Rotterdam cargo. Said stowage was prudent.

"(8) That at all of the material times herein due diligence was exercised to make the steamship 'West Aleta' in all respects seaworthy and properly manned, equipped and supplied.

"(9) That from December fourth, 1919, to January sixth, 1920, inclusive, an advertisement, a copy of which is hereto annexed, marked Exhibit 'E,' and hereby made a part hereof, appeared daily in the 'Daily Commercial News of San Francisco,' and on and between the same dates, inclusive, an advertisement, a copy of which is hereto annexed, marked Exhibit 'F' and hereby made a part hereof, appeared daily in 'The Guide,' a leading commercial paper of San Francisco.

"(10) That no greater value than that mentioned in Clause 2 and/or Clause 3 of the said bill of lading was stated by the shippers, nor was any bill of lading given and agreed therefor stating a greater value.

"(11) That the steamship 'West Aleta' sailed from San Francisco, California, on January sixth, 1920, having on board all the rice described in paragraphs (1) and (3) hereof. That in accordance with orders issued to the master, the vessel proceeded by the direct route from the Pacific Coast to the port of Hamburg via the Panama Canal. The course of the vessel and the circumstances of stranding are shown in a copy of the master's extended protest hereto attached, marked Exhibit 'G' and hereby made a part hereof. That on the

twelfth day of February, 1920, [143] at approximately two-twenty-eight o'clock A. M., the said vessel stranded and was wrecked on Terschelling Island in the North Sea, and, with all her cargo, she became a total loss. All the rice described in paragraphs (1) and (3) hereof was totally destroyed as a result of the stranding and wreck of said steamship as aforesaid.

"(12) That the only ground upon which libelant asserts claim against respondent is upon the ground of improper deviation.

"(13) If instead of proceeding toward Hamburg as her first port of call the steamer 'West Aleta' had put into Rotterdam as her first port of call, she would have arrived at Rotterdam on or about the eleventh day of February, 1920. If instead of proceeding toward Hamburg as her first port of call the steamer 'West Aleta,' had put into Cardiff, Wales, as her first port of call and there discharged cargo and then proceeded to the port of Rotterdam as her second port of call, she would have arrived at Rotterdam on or about the fifteenth day of February, 1920. The market value of the rice described in paragraphs (1) and (3) hereof at Rotterdam, Holland, on or about the eleventh day of February, 1920, and on or about the fifteenth day of February, 1920, was the sum of twenty thousand seven hundred eighty-two and seventy-nine hundredths (20,782.79) dollars.

"(14) That no claims in writing with respect to the matters involved herein were made, nor was this libel filed within nine (9) months after re-

spondent received the goods described in paragraphs (1) and (3) hereof.

"(15) That in stipulating the facts herein the respective parties do not concede the relevancy or materiality of any fact so stipulated. [144]

"(16) That either party may offer evidence upon matters deemed pertinent and not covered by this stipulation.

"Dated: San Francisco, California, November 19th, 1924."

We desire to call your Honor's attention to the stamped clause on the face of the bill of lading, which reads as follows: "The vessel shall have liberty to deviate for the purpose of making trial trips, and shall pay any reasonable increased cost of cargo insurance, if any, incurred in consequence thereof." That is to say, we shall contend that by reason of that clause giving the right to deviate in certain cases there was no right to deviate in other cases.

We shall also call your Honor's attention to paragraph 6 of the bill of lading, the bill of lading being common to all of the cases, which provides as follows:

"Also, that if, on account of weather, surf, earthquake, epidemic, quarantine, riot, war, or other disturbance, blockade or interdict of the port of destination, command of government or governments, or any cause beyond the control of the carrier, it should be considered impracticable or unsafe, in the opinion of the master, to land the goods at the port to which they are destined, the master

is to have the option of landing the goods at any other port which he may consider safe, or retain same on board until the vessel's return trip."

We shall contend later that by virtue of that clause, providing that the goods could be retained until the return trip in certain cases, we have there the equivalent of a prohibition against the vessel retaining the cargo for the return voyage in any other case than the cases there specified.

Attached to the bill of lading as exhibits are the various things mentioned, the managing agreement, and the operating [145] agreement, which run from the Shipping Board Emergency Fleet Corporation to Williams, Dimond & Co. Those are both dated September, 1919. That date may have bearing in our discussion later.

The bills of lading were issued on the goods in each instance shipped on the "Cockaponset" and later transshipped on the "West Aleta," and were in the identical form as the other bills of lading.

It has some bearing on the case, so I may properly refer to the fact that the "liberty-to-call" clause and the various other clauses set out in the bill of lading are printed clauses, whereas the course of the shipment from San Francisco to Rotterdam is in the written or typewritten portion of the bill of lading. We shall lay some emphasis on that later, because we think that the typewritten portions control the other portions.

The most interesting document, and perhaps one that is not as dry as the others, and which is attached to this stipulation, is the extended protest of

the captain. It is dated the 20th day of February, 1920, and was made within eight days after the loss of the ship. It is set out here for the purpose of showing the course of the voyage, and certain incidents in regard thereto. It may be of interest to your Honor, and I will read it.

Exhibit "G"—Translation of Protest Extended Before the Tribunal of Amsterdam.

"On this day the 20th of February, 1920, has appeared before Us, Dr. S. J. Carsten, Justice of the Tribunal of Amsterdam, in the presence of and assisted by Dr. H. B. Van der Elat, Deputy-Recorder of the said Tribunal, Mr. George Hillier Ewart, master of the American steamer 'West Aleta,' who, while producing the ship's log-book on which We have on this day placed [146] our Exhibition, has made to Us the following deposition, in the presence of the members of his crew named hereinafter, by intermediary of Mr. Jan Adrianus Pister Byl residing at Amsterdam, appointed by Us to act as interpreter and to whom We have administered the following oath or solemn declaration; that he shall faithfully perform his duties as interpreter:

"That the said ship being tight, staunch and strong, masts and pumps fitted with efficient double coats, fully provided with everything that is necessary for proper control of water, engines in good order, and consequently in a thoroughly efficient and responsible state to carry merchandise over sea, was loaded at San Francisco from the 26th December, 1919, until the 6th January of this year, with a com-

plete general cargo, bound for Hamburg, Rotterdam and Cardiff;

"That on the 7th January A. M. he left San Francisco with the said ship, crew consisting of 46 members, himself included, cargo properly loaded, located, stowed, dunnaged and secured as customary hatches closed, covered with good double tarpaulins and battened.

"That *t*he steamed through the Panama Canal and sailed from Cristobol on the 21st January at 12:20 P. M.;

"That the sea voyage was continued without any obstacles except that he encountered bad weather in the Car*aib*ian Sea;

"That on the 10th February at 2 A. M. he passed Bishop Rocks at a distance of 14 miles, passed Lizzard at 6:30 A. M. at 6½ miles' distance and St. Catherine's Lightship at 8:35 P. M. at 9½ miles' distance;

"That on the 11th February at 6:35 A. M. he passed South Foreland at 2 miles' distance and East Goodwin' Lightship at 7:20 A. M. at 1¾ miles' distance, where the deep sea lead was cast [147] and they shaped course 38° true (45° by standard compass) with 7° easterly variation and 14° Westerly deviation; at that moment the log indicated 210;

"At noon the position of the ship on observation appeared to be 51° 52′ 28″ Lat. No. and 2° 25′ Long. E. After the ship had proceeded 30 miles another observation was made at 2:30 P. M. in order to check course and position, when she was

found to be in 52° 12′ 16″ Lat. N. and 2° 49′ 24″ Long. E.;

"That towards 3 P. M. the weather changed and they had to contend with strong windsqualls which grew heavier and heavier until it was blowing a strong N. W. gale and the seas became running high;

"That at 8:40 P. M. on account of the heavy rolling and laboring of the ship, they put the vessel head to sea, 15° true course (24° standard) whilst the log indicated 88;

"That at 10 P. M. they changed course to E. N. E. magnetic, for fear of entering the northern minefield and also in order to be able to control the position of the ship and the current by bearing the lighthouse on the Dutch coast;

"That at 11 P. M. taking cross bearings Kykduin S. E. Magnetic, Eierland E ½ S. magnetic, he had fixed the position of the ship in accordance with the observation of that position at noon at 19 miles' distance, log 107½ Course NE. magnetic had just been shaped, taking drift and tide into account;

"That on the 12th February at 1:30 A. M. he observed on the starboard bow a white flashing light showing sudden flashes of 5 seconds duration, which corresponds with the nature of Norderney lightship and also an illuminated white buoy showing a flare every 7½ seconds which corresponds with the nature of buoy D of the war channel (it is customary to control all lights with a [148] second-watch with stop-spring, which was also done in this instance;

"That the course of the ship was deviated to 109° standard compass, equal to about 100° magnetic, in order to pass quite close alongside the buoy and to keep at a safe distance from the lightship;

"That at 2:15 he decreased the ship's speed, as he wished further to control the position of the ship with respect to the depth of water and to take accurate soundings;

"That at 2:25 when the ship was lying almost still, an accurate sounding was taken which indicated 14 fathoms. The distance performed and various nautical auxiliary means were all checked and by doing so we felt quite sure of being safely in the war channel but nevertheless we proceeded slowly into the direction of Norderney lightship, for the true course was 90° through the middle of the war channel which was deemed to contain the lightship we had in view;

"That at 2:28 the ship struck what afterwards proved to be a sand-ridge which projected several miles to the northward from the western end of the isle of Terschelling;

"That the engines were instantly put full speed astern, but the swell also caused the ships' broad side to be swung round: the engines were then put full speed ahead in order to put the vessel again bow to sea. The ship swang round fully 60°. As we were unable to get the ship any further and as she was falling off again, the engines were reversed once more, the so desired effect of which being that the ship's stern was again turned to the sea,

after which the ship and particularly her stern did not take breakers any more;

"That shortly after being aground a radio message was despatched which was answered by the SS. 'Tillford' and likewise by [149] a station on shore. The 'Tillford' communicated that she was coming to render assistance and the station on shore advised that 2 tugs were under way to render assistance, after which we requested to send out the lifeboat, because the position of the ship was very dangerous and she did already begin to bend badly, both afore and abaft of the midship's house. The sea was too heavy for lowering the ship's lifeboats into the water and we decided to wait for the arrival of the lifeboat, at the same time working the engines thoroughly in order to prevent the broad side of the ship from capsizing.

"We succeeded on attaining this end, it seemed that the ship was only aground amidships. At about 7:50 A. M. the ship gave signs of breaking up and the position became serious. The safety of the crew required all to leave the ship. This was fortunately accomplished by means of the lifeboat which landed the entire crew in Terschelling.

"Shortly after landing the lookout went into the lighthouse from where the ship could be seen and it then appeared that the ship had already broken in two. According to the observation made at noon the distance performed from the position last stated, corresponded with all data stated above concerning lightships mentioned in the war channel, born by taking soundings, and the error in the pre-

vent position of the ship can only be attributed to positive and unknown increase of the force of the drift, which drifted the ship on shore;

"That the damage which has already been or may still be found to ship and cargo, has not been caused by any previously existing defect of ship, rigging, machinery or appurtenances, bad stowage or other insufficient care of the cargo, nor by the action or neglect of him, the appearer, or his crew, but must solely be [150] attributed to the strong winds, high seas, the labouring, pitching and rolling of the ship and the big quantities of seawater that washed on board during this voyage, and to the accident described above, whereas he has used proper seamanship in every respect, lost no time nor wind, attended properly to the pumps, keeping them as dry as far as practicable and taken continuous care of a proper ventilation of the cargo.

"And, moreover, have appeared:

RARISON WILSON, Chief Officer,
JOSEPH HEARY JOHN DELANEY, Second Officer,
WILLIAM HEARY SHARPE, Chief Engineer,
GEORGE STANLEY KRAMER, Second Engineer,

all engaged on board the said ship during the said voyage, who have declared each one separately, but in the same tenor;

"That all statements made by their master as above, are in conformity with the truth;

"That they have been honest and faithful in

handling the cargo, without having committed any fraud or theft and that they do not know of such a thing having been done by anybody else, either directly or indirectly.

"As these depositions may and shall serve to prove any losses, disasters, or damages, and any claims whatever of the charterers of the ship, the appearers have finally requested us to be allowed to affirm their foregoing declaration by oath.

"Prior to affirming the deposition by oath, appeared Delaney testified not having been present at the controlling of the position, although he was on the watch, his work having required him to be engaged on the afterpart of the ship.

"Thereupon all appearers have affirmed their statements taking the prescribed oath in our hands.

"In witness whereof this protest has been drawn up and after being read in the English language by the above-named interpreter [151] and approved by the appearers, signed by the latter, the interpreter, by us, justice of the peace and the above-named recorder.

(w. s.) G. H. SWART.
H. WILSON.
J. J. DELANEY.
W. H. SHARPE.
G. S. KRAMER.
J. A. P. BYL.
A. J. CARSTEN.
H. B. v. d. ELAT.

"A true copy of the original.

"THE RECORDER OF THE TRIBUNAL OF AMSTERDAM."

"Translated by:

_____,

Sworn Translator, Rotterdam."

In each of the cases there is a substantially similar stipulation of facts. The stipulations are all in evidence here now. There is some variation regarding the way the cargo was shipped from San Francisco, but no variation, I think, regarding anything else.

There was attached to the answer, pursuant to our interrogatories, the sailing orders of the vessel. Those sailing orders, I take it, are considered in evidence here. They are identical in the three cases. I want to call your Honor's attention to only a few paragraphs in them. First in regard to the sailing orders, the managers of the vessel, that is, Williams, Dimond & Co., who issued these sailing orders, required that she go to Hamburg first. Paragraph 1 of the sailing orders reads:

> "Immediately upon your command's readiness for sea, and after all customs formalities have been complied with, you will proceed on your voyage via the Panama Canal and the most direct and safest route to Hamburg, Germany, which will be your first port of discharge."

So that this deviation which we charge, if it be a deviation, was at the direct instigation of the

operators of the ship, and [152] was not done by the captain of the ship of his own volition.

We will have occasion to go into the question of mine warnings. We shall contend that the trip from Cardiff and from Rotterdam into Hamburg was a praticularly dangerous trip. It was not only 700 nautical miles from Cardiff into Hamburg, but, correspondingly, 700 miles back, making 1,400 miles that this cargo was to be carried; and that it was 250 nautical miles from Rotterdam into Hamburg. So that that cargo it was proposed to carry 500 miles geographically. We expect to show not only that there was a very long distance greater than in many deviation cases, but that it was a particularly dangerous distance on account of mines; there were very many mines planted in the North Sea during the war period, the English mining the German coast, and, correspondingly, the Germans mining where they could the English coast. We shall show that these were particularly dangerous waters at this time, as this captain appreciated, because he changed his course just before the wreck, in order to avoid what he called the Northern mine field. We shall show your Honor on the charts just where that is.

Paragraph XIV of the shipping instructions refers particularly to mine warnings:

> "Mine Warnings: Necessary instructions for safe passage through the areas which have been mined during the war are being distributed by the hydrographic office of the Navy Department. It is very important that masters

of the United States Shipping Board vessels have the latest possible information. Before sailing from the Panama Canal you should interview the Hydrographic Officer at the Canal and secure the latest information in his possession.

"For your information, the following report was recently [153] received from the Shipping Board at Washington: 'Regret that American masters continue to arrive here without warning of any kind from American authorities regarding mine fields off Gothenberg. Loss of Shipping Board vessel "Lake Placid" on May 19th may be charged to incomplete information furnished to masters in United States, and unless this deplorable condition is not immediately remedied, more ships and lives will be lost in these waters.

"'American SS. "Winding Gulf" arrived here yesterday, June 22, 1919, after miraculous passage through Cattegat mine belt. Respectfully recommend wireless warnings be sent broadcast immediately. British mariners fully informed and alive to dangers. Telegraphed Skaw Lightship and Lighthouse to-day to warn all American ships.'"

That shows that the owners of the vessel, and the operators of it, appreciated the particularly dangerous character of the North Sea waters at this time.

The same matter is again touched on in the same orders issued by Williams, Dimond & Co., in paragraph 32. They say:

"Owing to conditions developing on account of any floating mines in the English Channel, also off the coast of Belgium and Holland, you will, as soon as you are in wireless touch with the United Kingdom, wireless our General European Agent, Mr. W. W. Thurston, London, giving him your position, and ask for further instructions regarding pilots, position, etc., and you will be governed by instructions you will receive in your passage through the channel from Mr. W. W. Thurston, or from Mr. Tobey, of the United States Shipping Board at London."

So the sailing orders, themselves, show the dangerous character of the North Sea on account of the floating mines, and also show that the owners and operators of the ship were thoroughly familiar [154] with those things.

We desire to offer in evidence in the three cases this map entitled "Europe, The North Sea, Compiled from the Latest Information Published Under the Authority of the Secretary of the Navy." This will be marked Libelant's Exhibit 2. Here is shown Cardiff. Here is the Bay of Bristol. The ship came along in this direction, according to the agreed statement of facts, she passed along here, the entrance to Rotterdam; she was wrecked on Terschelling Island. She was headed for Hamburg. Really, the whole basis of the case, from our point of view, is that she ought to have taken the Cardiff cargo here to Cardiff and unloaded it; then she ought to have gone to Rotterdam and unloaded that

cargo. Instead of doing that, she headed straight for Hamburg.

In order to show the conditions in the North Sea, we desire to offer these notices to mariners: "Mine Warnings to Mariners and Supplements to the Charts that are Referred to in the Sailing Directions." Counsel has already seen them. Perhaps I can show them to your Honor and then offer them. At this time we offer in evidence the copies of the "Mine Warnings to Mariners." We offer, first, No. 57, dated December 10, 1919. No. 63, dated January 6, 1920; No. 63a, dated January 6, 1920; No. 65, dated February 17, 1920, and ask that they be marked our exhibits next in order.

Mr. GRAHAM.—We have no objection to the authenticity of any of these mine warnings, nor to the maps that I suppose Mr. Mannon proposes to introduce, but we have a strenuous objection to their being introduced in evidence at all; there is nothing in the pleadings to in any wise indicate that the vessel was lost by striking a mine, floating or stationary; that it is expressly stipulated in the pleadings that the only ground of liability is an [155] alleged wrong deviation. The question of the presence or the absence of mines is not material in this case whatsoever.

Mr. MANNON.—In answer to that, if your Honor please, I would point out that we have to consider whether or not there was a deviation here; one of the things that counsel will argue, we think, is the question of the extent and character of the deviation. As I have already pointed out, from

Cardiff to Hamburg was the distance of 700 nautical miles, 1,400 going and coming back; and from Rotterdam into Hamburg was 250 nautical miles, 500 miles going and coming back. We want to show not only the distance, of which your Honor would take judicial notice, but we want to show the peculiarly difficult character of the navigation. It already appears in the statement of facts that the captain changed his course to avoid the Northern mine fields. We want to show your Honor where the Northern mine fields were.

The COURT.—I will overrule the objection.

Mr. MANNON.—The Mine Warning to Mariners No. 57, dated December 10, 1919, will be Libelant's Exhibit 3. Mine Warning to Mariners, No. 63, dated January 6, 1920, will be Libelant's Exhibit 4; Mine Warning to Mariners, No. 63a, dated January 6, 1920, will be Libelant's Exhibit No. 5. Mine Warning to Mariners, No. 65, dated February 17, 1920, will be Libelant's Exhibit 6. As evidence of the same character, we offer the Supplement to Pilot Chart of the North Atlantic Ocean, which is marked "Washington, D. C., Published December, 1919, at the Hydographic Office, under the authority of the Secretary of the Navy." We ask that that be marked Libelant's Exhibit 7.

Mr. GRAHAM.—We make the same objection, your Honor, to all these charts.

The COURT.—The same ruling. [156]

(The documents were marked, respectively, Libelant's Exhibits 2 to 7, inclusive.)

Mr. MANNON.—We also offer in evidence the

Supplement to Pilot Chart of the North Atlantic Ocean, marked "Washington, D. C., Published February, 1920, at the Hydrographic Office, under the authority of the Secretary of the Navy"; we ask that that be marked Libelant's Exhibit 8.

(The document was marked Libelant's Exhibit 8.)

We have taken the deposition of Captain A. M. Strong, in each case, in fact. Captain Strong is a mariner. He has operated in the North Sea. We went into Hamburg in December, 1919, and came out about January 15th, 1920. We offer the deposition in all the cases.

Mr. GRAHAM.—The same objection.

The COURT.—The same ruling.

Mr. MANNON.—These maps accompany the deposition. I will show them to your Honor.

Mr. GRAHAM.—We make the same objection to these maps.

Mr. MANNON.—I think that concludes our case. It has been suggested that we should introduce some evidence with regard to distances, but I take it that your Honor will take judicial notice of the distances in question.

We rest.

Mr. GRAHAM.—At this time we propose to object to the introduction of this bill of lading to show any liability on the part of the Emergency Fleet Corporation. The bill of lading has already been introduced in evidence. It is alleged that it shows the Emergency Fleet Corporation as the principal party respondent, or, rather, the proper party respondent.

Mr. MANNON.—In regard to that, if your Honor please, the [157] pleadings in this case read as follows, and I am reading now from one of the answers:

> "Answering until Article IV of said first alleged cause of libel, Respondent admits the issuance of its bills of lading on account of said shipments on the dates and for the quantities as aleged in said article, but, in this behalf, respondent refers to the original thereof, which it prays that the Libelant may be required to produce upon the trial."

So that the objection is entirely without the pleading, and is not properly made at this time. But answering further and entirely beyond that, your Honor bears in mind that these United States Shipping Board Emergency Fleet Corporation vessels were being operated by Williams, Dimond & Co. under a managing agreement for the Emergency Fleet Corporation. That agreement is in evidence here. There is the statement on these bills of lading that they are bills of lading of the Emergency Fleet Corporation, under the signature of Williams, Dimond & Co., Williams, Dimond & Co. being agents of the Emergency Fleet Corporation. In the Eastern case, to which reference has been already made, which case involved cargo that was lost at the same time, Judge Hand had occasion to answer the same objection that was made there in his opinion:

> "I think there can be no doubt that the Emergency Fleet Corporation is liable. The bills of lading, while signed by an agent, pur-

ported to be on behalf of the Emergency Fleet Corporation, for at the end of each one are the words, "Shippers are requested to carefully read this bill of lading, which constitutes the contract between the shipper or agent of the owner of the property carried, and the United States Shipping Board Emergency Fleet Corporation."

The COURT.—I will overrule the objection. [158]

Mr. GRAHAM.—If your Honor please: Just by way of a short opening statement on behalf of the respondent in all three of these cases, the Emergency Fleet Corporation, and with the thought that we will put on our witnesses the first think this afternoon, I would like to state to your Honor what we belive the case to be, and what we will attempt to prove. Mr. Mannon has very ably brought to your Honor's attention the main facts, the route the vessel was directed to take, the route she did take, the cargo which was on board, the amount of cargo, and has read what he deemed to be pertinent clauses in the bills of lading, and very aptly phrased the so-called deviation clause as a liberty-to-call clause; I need not read it to you again, as you have heard what it is. It is our contention that under this clause, worded as it is, the ship had the right to make the voyage which she did make; in other words, she had the right to touch at any port or ports, in any rotation or order, in or out of the customary route, and to call at any port or ports more than once.

With reference to the special clause which is stamped on the bill of lading, regarding trial trips and increased insurance, we will attempt to show the specific purpose for which that was put on.

We will further attempt to show that at this particular time it was the custom, not only of the vessels of this line, but of the vessels of other lines operating out of the Pacific Coast of North America in this European Pacific trade, which included ports in the United Kingdom, ports on the Continent of Europe as far north as Hamburg, and even further north into the Baltic, and probably as far south as Bordeaux, to call at ports for which cargo had been loaded, and was being carried at other than their geographical order; in other words, that it was customary [159] not to go in the geographical order, and that that custom was known to the shipping public in San Francico, and was known by these shippers specifically, or should have been known by them.

We will further attempt to prove by shippers that they did know this custom.

We will further attempt to prove that under the very deviation clause in question, the construction of the shippers was that she had that right to go in other than the geographical order. We take it that in the construction of a commercial document, such as a bill of lading is, that the opinion of users of that commercial document is admissible.

We will further attempt to show that by the advertisement which appeared in "The Guide," and also in the "Daily Commercial News," the sailings of

the ships of Williams, Dimond & Co., and specifically of the "West Aleta," which advertisement appeared from December 4, 1919, to January 6, 1920, the date of the sailing of the vessel, that by so advertising the specific route which the vessel did take, that this advertisement virtually became a part of the contract, and was sufficient notice to shippers of the route taken; and that the indication on the bill of lading that the goods were received in San Francisco for shipment into the port of Cardiff, Rotterdam or Hamburg, whichever the case might have been, did not in itself indicate that the vessel was going to any one of those ports directly; and that in order to clear the question of the route to be taken, the operators of this vessel—Williams, Dimond & Co.—advertised in the usual customary way, in a paper which we will attempt to show was received by the libelants in this case for a long period of years, and is now received by them and is relied upon by them, as well as by the shipping public in San Francisco. [160]

If your Honor please, we will put on our first witness at two o'clock.

The COURT.—You have no witnesses here now, do you mean?

Mr. GRAHAM.—Yes, we have a witness here, if your Honor wishes to go ahead right now.

The COURT.—Yes, I think so, if you have your witness here. How long do you think it will take you to present your case?

(Testimony of Fred A. Hooper.)

Mr. GRAHAM.—I think it will probably take two or three days, your Honor.

The COURT.—Then you had better proceed now.

TESTIMONY OF FRED A. HOOPER, FOR RESPONDENT.

FRED A. HOOPER, called for the respondent, sworn.

Mr. GRAHAM.—Q. Mr. Hooper, by whom are you now employed?

A. The American-Hawaiian Steamship Co.

Q. By whom were you employed in 1919 and 1920, the time the "West Aleta" was loaded out of San Francisco? A. Williams, Dimond & Co.

Q. They were the operators of the "West Aleta," were they? A. Yes, sir.

Q. How long had you been with Williams, Dimond & Co.? A. 16 years.

Q. What was your position, or in what capacity did you serve with Williams, Dimond & Co. in 1919 and 1920?

A. As general freight agent, in charge of traffic.

Q. Did you have charge of the arrangements relative to the booking of cargo, reservation of space, and, in general, the traffic management of the "West Aleta"? A. Yes.

Q. Did you yourself, have charge of the arrangements leading to the shipment by these three libelants, the California Wine Association, Rosenberg Bros., and S. L. Jones? A. Yes. [161]

(Testimony of Fred A. Hooper.)

Q. How long had your firm been engaged in the Shipping Business? A. Since about 1860.

Q. How long have they been engaged in this so-called European-Pacific service?

A. We instituted that service for account of the Shipping Board, I believe it was perhaps late in 1918 or early in 1919.

Q. Approximately how many ships had been sent in that service from the Pacific Coast to the United Kingdom or to continental ports?

A. There had been sent in the service—do you mean what was our entire fleet?

Q. Yes.

A. We operated from 10 to 16 or 18 vessels in that fleet, off and on.

Q. As to the routes which those various vessels took for the period they were operated by you, both before and after the "West Aleta," just state, in general, what the general custom of your firm was?

A. The situation at that time, so far as the United Kingdom and Continental ports were concerned, through the British Channel, was in a very upset condition, owing to the situation that existed after the war; the cargo situation was such, both outward and inward cargo, that it was impossible to establish a definite service with definite or regular ports of call. We were obliged to operate steamers to and from the ports at which cargo offered; in other words, a steamer on the berth for a certain period may have cargo offering for

(Testimony of Fred A. Hooper.)

United Kingdom ports only; hence, that steamer was advertised for United Kingdom ports only. For the following steamer, conditions may have changed, and it was probable, or possible, that parcels of cargo would offer for continental ports. Our fleet, in operating this fleet of vessels, covered United Kingdom and Irish ports, and ports in the Bordeaux-Hamburg range. In other words, we were at liberty to book cargo [162] on any ship for any port within those particular ranges. We had to govern ourselves in handling the cargo according to the quantities offered for the ports, in order to make our discharge at the various ports so as to keep our ships seaworthy and not run the risk of invalidating insurance for account of shippers. Furthermore, owing to the very severe congestion at the United Kingdom ports, we were obliged to handle our ships so that they would make the inbound or the delivery call, and the outbound or their loading call at the same time. The situation was such that it was not unusual for American ships, in making the English ports, to be delayed from 10 days to 3 weeks in one entry. So, therefore, we were obliged, as I say, to make the call at Liverpool or London so that we could discharge or load at the same time. Furthermore, not alone from an economic and efficiency standpoint was that necessary, but it was also necessary, or we deemed it so, in order to facilitate, as far as possible, and expedite the delivery of cargo for account of shippers. In handling our fleet, it was our

(Testimony of Fred A. Hooper.)

policy, and I believe it is the policy of all steamship companies, to very largely, or firstly, bear in mind the efficiency of your service to your customers in order to keep your service popular and make it attractive, so that you can secure business; in other words, in operating a ship at that particular time, we could not throw overboard any regards for the shipper, we must handle the shipper's cargo with as quick dispatch as possible; therefore, the only way to do that was to route our ships via the port in or out of order, or in whichever way we could handle them for the best advantage of all the parties concerned. Therefore, our route being one that was just established, and one that was operating under these abnormal conditions, we had the privilege, we felt, [163] under our bills of lading, so long as we did not exceed our range ports, which, as I have said, were United Kingdom and Irish ports, and Bordeau-Hamburg range—so long as we did not exceed those ports we believed we had the privilege to route our vessels in and around those ports under the clause of the bill of lading, without any risk of invalidating insurance for account of shippers, because we always had that in mind.

Q. In the stipulation of facts there is a copy of an advertisement which appeared in "The Guide"; was your firm in the practice of advertising sailings of its vessels in "The Guide"? A. Always.

Q. How long had you done that, do you know?

A. To my personal knowledge, they did it for

(Testimony of Fred A. Hooper.)

16 years. I had direct contact with it during that period.

Q. Do you know anything about this practice since then? A. It is still the same.

Q. What is your purpose in advertising in "The Guide"?

Mr. MANNON.—That is objected to as immaterial.

The COURT.—Objection overruled.

A. The purpose in advertising in "The Guide" was this, that through "The Guide" the shipping public who considered "The Guide" as authoritative in following vessels' schedules, routes, etc., in advertising in "The Guide," we were obliged to advertise the route a vessel would take, for the purpose of keeping the shipping public, insurance companies, and others interested in shipping advised as to what route the ship took. It was necessary to do that, and it is necessary to do that, because the insurance companies must know the route of a vessel in order to properly place insurance. Without an official advertisement, unless they would make personal inquiry every time a policy was presented to them, they would have no means of knowing how the ship was going to [164] move, especially in the European-Pacific service, where we never sent a ship in the same order of ports twice in succession, that I can remember.

Mr. GRAHAM.—Q. Briefly, what would you have described your service to have been at that time—a direct line of service, or a tramp, or what?

(Testimony of Fred A. Hooper.)

A. No, our service might have been termed more in the nature of a tramp line of service; in other words, we were not a tramp service in one sense of the word, because our service was too frequent for a tramp service, but we were a tramp service so far as our order of ports was concerned, because we did not have a regularly scheduled order of ports, but we had a range of ports, and we were permitted to make any ports within that range, and we tramped that range with an irregular schedule of service as to ports of call.

Q. Your sailings were more or less regular, were they?

A. Our sailings were frequent. They were too frequent to be what is commonly termed a tramp service. A tramp service is one which has a service, say, once every six weeks, or two months, or twice a year, or once a year, or something of that kind—very infrequent service.

Q. A copy of the bill of lading has been introduced in the stipulation of facts. I show you one in the Rosenberg case. They are all similar. I will ask you who makes up these bills of lading, who does the typing in them?

A. A stenographer at that time in my office made them up, under the instructions and directions of Mr. H. C. Brown, who was the bill of lading clerk and had supervision of all that particular department.

Q. At that time, or at any other time in your experience, what has been your experience relative

(Testimony of Fred A. Hooper.)

to putting in in typewriting the ports? That is, do you put in the port of departure and [165] the port of destination, or what do you put in?

Mr. MANNON.—I object to that as immaterial, irrelevant and incompetent, on the ground that the bill of lading necessarily must speak for itself. I desire to argue that question at some length later on.

Mr. GRAHAM.—If your Honor please, we will attempt to show that a bill of lading, which has on it only the port of shipment and the port of destination, does not in any wise indicate the routing. The question of the routing of this vessel is one of the very important questions in this case.

The COURT.—Objection overruled.

Mr. MANNON.—I may be heard on that question later, if your Honor please?

The COURT.—Oh, yes.

A. We put in the port of departure and the port of destination.

Mr. GRAHAM.—Q. You have already testified you did advertise in "The Guide"; was it your practice at that time, and at all times in fact, to advertise the ports in the order in which they were to be made by the vessel?

A. We always advertise the order of ports of call for the distinct purpose of advising shippers, so that they, in turn, could protect themselves with insurance covering the route indicated by the ship.

Q. At that time did you take any other means of

(Testimony of Fred A. Hooper.)

advising the shippers except through this advertisement that you considered was sufficient?

Mr. MANNON.—We object to that on the ground that it is not pleaded.

Mr. GRAHAM.—We will attempt later to prove that the particular advertisement did come to the attention of the libelants. That is one of the reasons why I did not want to put Mr. Hopper [166] on first. I will put on another witness this afternoon to show that the libelants were subscribers to "The Guide."

The COURT.—I will overrule the objection.

A. We did not use any other method as a regular proposition, because we considered "The Guide" the official announcer of vessels in our particular service.

Mr. GRAHAM.—Q. At that time what was the condition of the shipping and the shipper's market; in other words, was there great or little demand for space?

A. The outward demand was very good, shippers being principally concerned in securing a ship that would make the port which they desired. The question of making ports in geographical order, so far as my experience went, was never at any time discussed with me, objected to or talked about by any shipper.

Mr. MANNON.—We move to strike out all of the answer of the witness except the first sentence, on the ground that it is his conclusion as to what the shippers proposed to do, and not shown to have

(Testimony of Fred A. Hooper.)

been brought to their knowledge in any way, and not the result of any conversation with them, or not the result of any touch with them of any character. If there were conversations, then the conversations should be given. If there were writings, then we think the writings should be shown.

The COURT.—Is it your claim that the statement of the witness embraces a statement of the custom?

Mr. GRAHAM.—I desire to ask Mr. Hooper as to the condition in the shipping trade in San Francisco at that time, and from his knowledge as the traffic manager of Williams, Dimond & Co. he would naturally have a knowledge of the custom, of the general condition in San Francisco.

The COURT.—But his answer seems to be his personal view. What [167] you want is the custom. Testimony as to custom might be admissible if it is not governed by a contract or a writing. Is that your view, Mr. Mannon?

Mr. MANNON.—Yes, your Honor. My objection was that the witness was proceeding to testify as to what the shippers proposed to do, or what they wanted to do. We think we are not bound by the witness' conclusion. The witness was not testifying to custom at that time.

The COURT.—A good deal of his answer was not responsive. All of it which is not responsive may go out.

Mr. GRAHAM.—Q. At that particular time did you have any conversations that you can now re-

(Testimony of Fred A. Hooper.)

member with the traffic managers or the persons who handled the booking of this cargo for these three libelants?

A. I had very many extended conversations with the California Wine Association people.

Q. What was the man's name in the California Wine Association with whom you had most of your dealings, and how did you have your dealings, what was the method of dealing?

A. Mr. Jenks. The method was by personal contact and conversation, and also telephone conversation.

Q. What did Mr. Jenks first tell you in relation to the booking of a large quantity of wine on the "West Aleta"?

Mr. MANNON.—If your Honor please, we desire to object to all of this evidence—and I understand there will be quite a lot of it offered—with regard to what was done in the way of preliminary negotiations before the execution of these bills of lading. Your Honor is, of course, thoroughly familiar with the ordinary rule that parole evidence cannot be used for the purpose of altering, varying or contradicting a written contract. That rule is extended to bills of lading. We have the authorities here to substantiate it. Would your Honor desire to hear those [168] at this time, or would you prefer to have that matter come up later?

The COURT.—I will hear you. I have no doubt that is the law.

(Thereupon the objection was argued by respec-

(Testimony of E. C. Gross.)

tive counsel, pending the conclusion of which a recess was taken until two o'clock P. M.)

AFTERNOON SESSION.

Mr. GRAHAM.—With your Honor's consent, I would like to have the privilege at this time of withdrawing Mr. Hooper and putting on the stand, out of order, and it will only occupy a very few moments, a representative from "The Guide" and a representative from the "Daily Commercial News."

The COURT.—I have no objection.

Mr. MANNON.—And it will be understood that all of this evidence is interposed subject to our objection that parole evidence is not admissible to vary the terms of a written contract.

The COURT.—Yes, that will be the understanding.

TESTIMONY OF E. C. GROSS, FOR RESPONDENT.

E. C. GROSS, called for the respondent, sworn.

Mr. MANNON.—Mr. Graham, we might shorten this if you will state to me what you expect to prove by this witness.

Mr. GRAHAM.—I expect to prove by Mr. Gross that this is a photostatic copy of "The Guide," published by them on that date. I also expect to prove by him the manner in which they obtain [169] the information that is printed in

(Testimony of L. K. Grimm.)

"The Guide," and particularly as respects the advestisement of Williams, Dimond & Co.

Mr. MANNON.—We accept counsel's statement that that is a photostatic copy of "The Guide" of date January 5, 1920. If you state to me how he gets his information, perhaps we can admit that, too.

Mr. GRAHAM.—Mr. Gross goes to the various steamship companies on his particular route, as he calls it, he has certain companies designated which he goes to every day, and gets from them the information which is subsequently published in "The Guide."

Mr. MANNON.—We will accept counsel's statement for that, that the witness will so testify.

Mr. GRAHAM.—I prefer to have the witness testify, if there is no objection.

The COURT.—But the admission covers it; that will save time.

Mr. GRAHAM.—Very well. Then we offer this in evidence.

(The document was here marked Respondent's Exhibit "A.")

TESTIMONY OF L. K. GRIMM, FOR RESPONDENT.

L. K. GRIMM, called for the respondent, sworn.

Mr. MANNON.—Do you expect to prove by this witness that "The Guide" was delivered to the three libelants in these three cases?

Mr. GRAHAM.—Yes.

Mr. MANNON.—At their places of business.

Mr. GRAHAM.—Yes, at their places of business.

Mr. MANNON.—We will admit that.

The COURT.—Do you admit that, or do you admit that the witness will so testify?

Mr. MANNON.—We admit that the witness will so testify, and I guess it is the fact, too.

Mr. GRAHAM.—The witness will testify that Rosenberg Bros. & [170] Co. were subscribers, and that he delivered to them a copy of "The Guide" from March 1, 1915, to and including the present time, with no exceptions.

S. L. Jones as of the same dates.

The California Wine Association from 1918 to the present time.

He will further testify that it was delivered to them without any lapse during all of these times, up to and including the present time. He will also testify that had they not received a copy of "The Guide," each and every one of these libelants, they would have complained to him; and, furthermore, that during the times in which these advertisements appeared, the times which are pertinent in this case, he received no complaints from them at all; he knows that he would have received complaints from them, because of failure to deliver "The Guide" to them, because he has, within very recent months, received such complaint.

Mr. MANNON.—We will admit all that, but, of course, if your Honor please, the witness could not testify to what other people would do.

(Testimony of William H. Houston.)

Mr. GRAHAM.—He can only testify to what they have done.

Mr. MANNON.—We will admit that this witness will testify in accordance with Mr. Graham's suggestion; we object, however, to that part of the testimony wherein it is stated what the California Wine Association, for instance, would have done if it had not received its paper.

The COURT.—I will sustain the objection as to that part of the offer.

Mr. GRAHAM.—Does your Honor sustain the objection to the part of the offer that at times since then, when they did not receive their paper, they did make a complaint?

The COURT.—No, I will admit that part of it. [171]

TESTIMONY OF WILLIAM H. HOUSTON, FOR RESPONDENT.

WILLIAM H. HOUSTON, called for the respondent, sworn.

Mr. GRAHAM.—I suppose Mr. Mannon would like me to state what I hope to have this witness testify to.

Mr. MANNON.—Either that, or else let him make the statement.

Mr. GRAHAM.—I introduce this copy of the "Daily Commercial News," of Friday, January 2, 1920, as Respondent's Exhibit "B."

(Testimony of William H. Houston.)

Mr. MANNON.—We will admit that that is such a copy of the paper. Is that ad the same ad that is in the stipulation of facts?

Mr. GRAHAM.—Yes.

Q. Mr. Houston, this is a copy of the "Daily Commercial News" of that date? A. Yes.

Q. What connection have you with this paper?

A. I am vice-president and I am secretary and treasurer of the corporation.

Q. And you know that that ad appeared in that paper on that date? A. Yes.

Mr. GRAHAM.—It is stipulated it appeared on various other dates, also, your Honor.

Q. Do you know whether S. L. Jones and Rosenberg Bros. were subscribers to this paper during the month of January, 1920?

Mr. MANNON.—We admit that they were.

Mr. GRAHAM.—Q. And that a copy was delivered to them during those months?

Mr. MANNON.—He cannot know that. I object to that as immaterial irrelevant and incompetent.

The COURT.—It was the practice of the paper to send it to its subscribers. I guess there is no question about that.

Mr. MANNON.—We will admit that without the necessity of calling anybody else.

Mr. GRAHAM.—Q. Did you receive any complaints during those [172] months from them because of their failure to receive their paper?

A. I cannot answer that, I don't know.

(Testimony of Fred A. Hooper.)

Mr. MANNON.—The California Wine Association did not subscribe for that paper.

Mr. GRAHAM.—No. That is all.

Mr. MANNON.—No questions.

TESTIMONY OF FRED A. HOOPER, FOR RESPONDENT (RESUMED).

FRED A. HOOPER, direct examination (resumed).

(Thereupon counsel concluded the argument on the objection.)

The COURT.—The testimony will be taken subject to the objection.

Mr. MANNON.—And, if your Honor please, without repeating the objection in the record, may it be understood that all of the testimony that goes to varying in any way the bill of lading, with regard to knowledge or with regard to custom, or other matters, may be deemed objected to now and a ruling made and an exception taken?

Mr. GRAHAM.—That is satisfactory. It goes to the whole field of what is outside the written contract.

Mr. MANNON.—Yes. Your Honor understands what our contention is, and we don't want to be deemed to have waived it because of our failure to object to each question.

The COURT.—Yes, that will be the understanding.

Mr. GRAHAM.—Now, Mr. Reporter, will you read the pending question?

(Testimony of Fred A. Hooper.)

(Thereupon the reporter read the question, as follows:)

"Q. What did Mr. Jenks first tell you in relation to the booking of a large quantity of wine on the 'West Aleta'?"

Mr. MANNON.—Will you fix the time and place of these conversations, as nearly as you can, Mr. Graham?

Mr. GRAHAM.—Yes. Fix the time in general, as well as you can, [173] the first time, remembering that it is four and more years ago.

A. I would indicate the dates of these conversations as during the month of December, 1918, I guess it was—

Q. 1919?

A. Yes, 1919. On account of long experience with Mr. Jenks in a business way, in shipping matters, I was well aware that he was a man that was very technical and very decided in his ideas as to having full and complete information regarding any transaction which he entered into covering the movement of any of his cargoes—

Mr. MANNON.—I move to strike out that comment on Mr. Jenks as immaterial, irrelevant and incompetent, and not responsive to the question.

The COURT.—Motion granted.

A. (Continuing.) Mr. Jenks called me over and stated that he desired to make arrangements for the movement of large quantities of wine to various European ports, and wanted to know what we could do. In the conversation he stated that amongst the

II The remedy under the admiralty act is not exclusive - The Fleet Corp was liable in personam - There was no lis in the San Francisco District - or elsewhere -

III. The rule that State claims will not be enforced in admiralty does not apply. Laches will bar. But until after the decision of the Sloan case, it was not certain libels in personam could be maintained. The lower courts - as is frequently done - adopted or followed the policy of the State statute of limitations

119. 120. 121.

Both Court below found deviation.

Petitioners argue that the Liberty Clause in the bills of lading authorised the passing of Cardiff & Rotterdam —

"with liberty &c. to touch at any port or ports in any rotation or order and to call at any port or ports more than once"

It says ① Regard must be had to more than a single b/l. ② the draught & bulky cargo was destined (2) and the language of the Liberty Clause.

Note. The principal part — almost all in value — was destined to Cardiff — ② To have gone to Cardiff first on the outbound voyage would have added no distance ~~to the~~ ~~future~~. (3) — It would have avoided the 1600 miles of distance for the Cargo (4) it would have avoided the Mines here. (5) The voyage to Hamburg beyond the Scotch Islands was in no sense along or near the route to Cardiff & Hamburg was not a port to be passed on the voyage to Cardiff.

(Testimony of Fred A. Hooper.)

various ports in which he was interested was Cardiff. I told him that we had never sent a ship in to Cardiff, owing to the fact that there was never sufficient cargo offered, but if he had offerings in sufficient quantity we would be interested. The result was his indication of a great many thousand barrels of wine to move to Cardiff. I distinctly remember of advising him that we would be glad to handle his consignment, but that it would have to be handled on a steamer that made the continental ports, or English ports first, owing to the fact that it was necessary to stow wine cargo in the lower holds for stiffening, and we could not make satisfactory and safe stowage and keep the ship seaworthy if we loaded that amount of wine for first discharge at Cardiff. Mr. Jenks said that he was not at all interested in what order the ports [174] were made, so long as we could deliver the wine at Cardiff, that it was necessary that the wine be moved from the United States territory within a certain period, and they were anxious to see that the wine was on its way. The shipments of wine accepted for other ports were accepted under the same understanding, and during the same time of these various conversations, in or about the month of December, as stated.

Mr. GRAHAM.—Q. Did you have any written correspondence with Mr. Jenks or with any of the rest of these libelants, relative to the route which this vessel would take, other than what you have just testified to?

A. Nothing in writing whatever. The conversa-

(Testimony of Fred A. Hooper.)

tion with Mr. Jenks in such detail was owing to the fact that they had never shipped wine in such quantities to Europe before, and hence Mr. Jenks was most determined to have full and complete information before him as to how we operated, and how the wine would be handled, and all information in detail. So far as S. L. Jones and Rosenberg were concerned, they were regular and constant shippers to various European ports in connection with our line, and were well aware with the general practices and methods and regulations under which we operated the fleet at that time.

Mr. MANNON.—If your Honor please, we move to strike out the statement of the witness with regard to what Rosenberg knew and with regard to what Jones knew, upon the ground that it is immaterial, irrelevant and incompetent, and not a proper method of proof, and which, in the nature of things, the witness could not know.

The COURT.—Are you willing that that should go out, Mr. Graham?

Mr. GRAHAM.—Yes, your Honor.

The COURT.—Motion granted.

Mr. GRAHAM.—Q. Had you any other shipments made by S. L. [175] Jones and Rosenberg Bros. on your vessel, the "West Aleta"? A. Yes.

Q. With whom did you deal in these companies?

A. For Rosenberg Bros. we dealt almost exclusively with Mr. H. R. Higgins, the general traffic man. With S. L. Jones we dealt with—

Mr. MANNON.—Mr. Bozeman?

(Testimony of Fred A. Hooper.)

Mr. GRAHAM.—Mr. Mannon suggests that it might have been with Mr. Bozeman.

A. Yes, Mr. Bozeman.

Q. And they both had shipments on your vessels before? A. Yes.

Q. How had Mr. Jenks impressed you in regard to his desire for minute details, as to the voyage?

Mr. MANNON.—I object to the question on the ground that it is incompetent. The witness might testify to what Mr. Jenks told him.

The COURT.—Objection sustained.

Mr. MANNON.—If your Honor please, counsel produces what he states is the manifest of the "West Aleta" on the voyage in question. It may go in evidence without further identification.

Mr. GRAHAM.—I offer this in evidence and ask that it be marked Respondent's Exhibit "C." This is the manifest covering all of the cargo shipped on the "West Aleta," Voyage 51, which sailed from San Francisco on January 6, 1920, and with which we are concerned. It shows the various weights, and so on. In the stipulation of facts which we have entered into previously, we have stipulated as to the tonnage on this vessel.

Q. You are familiar with the manifest, are you, Mr. Hooper? A. Yes.

Q. Will you just tell the Court who some of the biggest shippers were on that voyage?

A. To any particular port?

Q. Just pick out indiscriminately the three ports.

(Testimony of Fred A. Hooper.)

Of course, there are the three libelants; now, just pick out half a dozen others.

A. Beck-Vansiclen & Co.

Q. Did Beck-Vansiclen & Co. do quite a business with you people [176] at that time, or did they do a business with you people at that time?

A. Yes, they did.

Q. What was the extent of their business?

A. It was very extensive, and frequent, and in large parcels.

Q. What port did they ship to principally?

A. Hamburg. The California Canneries Co. also were large shippers, and were frequent shippers.

Q. Was their situation about the same as Beck-Vansiclen & Co.?

A. Yes. The California Canneries shipped to all ports, whereas Beck-Vansiclen & Co. confined their business principally to Hamburg; they had very little outside of Hamburg.

Mr. MANNON.—I will state, if your Honor please, that this is the manifest of the "Effingham"; we do not wish it to be put in evidence. It shows that Rosenberg Bros. & Co. shipped 2,000 cases of dried prunes to Liverpool; also 1,000 bags of rice to Liverpool.

The COURT.—This is on another ship?

Mr. MANNON.—This is on an earlier ship.

Mr. GRAHAM.—Q. So that Rosenbergs were shippers on the "Effingham," also? A. Yes.

Q. I show you a copy of the ad of Williams, Dimond & Co., which shows the "Effingham" sailing,

(Testimony of Fred A. Hooper.)

and ask you if that is the order of the ports of call?

A. The ad shows Hamburg, London and Liverpool.

Mr. MANNON.—The witness is looking at Exhibit "F" attached to the stipulation of facts in the California Wine Association case.

A. (Continuing.) The steamer "Effingham" was supposed to sail entirely in accordance with our scheduled order of ports, as advertised. [177]

Mr. GRAHAM.—Q. Did she sail that way, as a matter of fact?

Mr. MANNON.—Just a moment, Mr. Hooper, before you answer that last question. If your Honor please, I move to strike out that statement as being a volunteered statement by the witness, and as immaterial. Well, I will withdraw the motion to strike.

Mr. GRAHAM.—Q. Did the "Effingham" make that voyage as advertised? A. Yes.

Q. Do you remember when the "Effingham" sailed from San Francisco, Mr. Hooper? If you cannot remember the exact date, just state the approximate date.

A. I don't remember the exact date, but she was supposed to sail before the "West Aleta."

Q. Did she, in fact, sail before the "West Aleta"?

A. Yes.

Q. Referring to the vessel "Cockaponset," as set out in Exhibit "E," just tell the Court what happened in the case of the "Cockaponset."

A. The "Cockaponset" was loading cargo at the

(Testimony of Fred A. Hooper.)

pier preparatory to sailing for the ports of Hamburg, Antwerp and Rotterdam, and her cargo caught fire at the dock and considerable of it was burned; in fact, the fire rendered it impossible for her to sail as scheduled, and considerable of her cargo was lifted by the "West Aleta," the following ship.

Mr. GRAHAM.—I think it is in the record, in the stipulation of facts, or, rather, it is in the libels, in fact, that one or more of these libelants had cargo booked on the "Cockaponset," and that it was subsequently transferred to the "West Aleta."

Q. Now, as to the amount of cargo on this vessel, Mr. Hooper, I will just read you briefly the stipulation here:

"No. 6. Steamship 'West Aleta,' loaded and carried approximately 2634 tons of cargo destined for Cardiff. 1503 tons destined for Rotterdam. 661 tons for Hamburg. Said Cardiff and Rotterdam cargo was chiefly barrels of wine, brandy and oil, and [178] said cargo was in the main stowed in the lower hold, and the Hamburg cargo was principally stowed on top of said Cardiff and Rotterdam cargo. Said stowage was prudent."

Are you familiar with the stowage plan on that ship? A. Yes, sir.

Q. You didn't draw it yourself, did you?

A. I didn't draw it myself, but I had to inspect it.

Q. How much do you know about this stowage plan? Do you know that the cargo was stowed as it is indicated in this plan? You have seen the plan, haven't you?

(Testimony of Fred A. Hooper.)

A. I have seen the plan.

Q. Do you know in fact that the cargo was stowed as is indicated on this plan?

A. I saw part of the cargo stowed on the ship, as I did with every one of our ships moving. I saw more or less of the cargo loaded. I didn't see every package loaded. I did not inspect every hold after she was loaded.

Q. But you do know generally that the locations as indicated on this plan are correct?

A. Yes. I might state that those stowage plans are used by us as official documents, consequently we consider them authentic.

Mr. GRAHAM.—Mr. Mannon has suggested that we ought to prove the stowage plan by a man who knows more about it than Mr. Hooper, although Mr. Hooper can testify that he knows in general that the cargo was loaded as indicated in this plan. I would like a ruling from the Court on that, because I would like to put this in now.

The COURT.—He says it is authentic and is used by his company.

Mr. GRAHAM.—And he will testify that he knows the cargo was loaded in the places in which it is indicated on the plan, although he did not draw the plan, and he did not see all of it go in.

The COURT.—But you have someone else, you say, by whom you— [179]

Mr. GRAHAM.—Yes, I can bring out another party, your Honor.

The COURT.—Very well.

Mr. MANNON.—We have stipulated that the Cardiff and the Rotterdam cargo were stowed principally below, and the Hamburg cargo was stowed principally on top. That is all that this plan shows, as I understand it. Hence it seems to me that this is immaterial.

Mr. GRAHAM.—I don't understand by the stipulation that we are debarred from putting in further proof on the same point.

Mr. MANNON.—Oh, no, I don't want to cut you off at all, Mr. Graham, only that I don't think this is necessary.

The COURT.—If it is covered by the stipulation, I think that is all that is necessary.

Mr. MANNON.—Our stipulation reads: "Said Cardiff and Rotterdam cargo was chiefly barrels of wine, brandy and oil, and said cargo was in the main stowed in the lower hold, and the Hamburg cargo was principally stowed on top of said Cardiff and Rotterdam cargo. Said stowage was prudent." What I was getting at in my discussion with counsel was whether he had any other purpose in offering this in evidence, other than as covered in the stipulation. In other words, I think it is all covered.

Mr. GRAHAM.—I simply wanted to make it more graphic. I think this cargo stowage plan is better than the stipulation. I wanted to make it more graphic. I am putting it in for that purpose.

The COURT.—Do you object to it?

Mr. MANNON.—Yes, on the ground that it is immaterial, irrelevant and incompetent, and that

(Testimony of Fred A. Hooper.)

it is already covered in the stipulation of facts; furthermore, the witness does not know that the stowage plan is correct.

The COURT. — Objection sustained on both grounds.

Mr. GRAHAM.—Q. So that according to the stipulation, Mr. [180] Hooper, there were approximately 4,798 tons of cargo on the vessel? Do you remember how many barrels of wine there were from the California Wine Association for Cardiff?

A. In the neighborhood of 12,000 barrels, I believe.

Q. Approximately how much was that in tons?

A. Wine will average 500 pounds to the barrel.

Mr. MANNON.—I think there were 11,000 barrels, according to the pleadings; I think the weight is shown by the bill of lading.

A. It would be about 2,000-odd tons.

Mr. GRAHAM.—Q. So that of the 2,634 tons for Cardiff there were over 2,000 of it from the California Wine Association? A. Yes.

Q. The California Wine Association also had cargo for Hamburg and Rotterdam, did it not?

A. Yes.

Q. So that it knew that the vessel was going to the three ports, did it not? A. Yes.

Q. How about Rosenberg and S. L. Jones?

A. Rosenberg nor S. L. Jones neither had cargo for Cardiff, as far as I can remember. I would

(Testimony of Fred A. Hooper.)

have to definitely look at the manifest to determine that.

Mr. MANNON.—It is agreed between us, isn't it, that the California Wine Association had cargo for Cardiff, but that Rosenberg Bros. had no Cardiff cargo, and that S. L. Jones & Co. had no Cardiff cargo?

Mr. GRAHAM.—That is correct.

Mr. MANNON.—And it is also agreed that the California Wine Association and Jones and Rosenberg had this cargo for Rotterdam.

Mr. GRAHAM.—Yes.

Mr. MANNON.—And that Rosenberg Bros. had some considerable cargo, as shown by this manifest, for Hamburg. The California Wine Association had, I think, 5 barrels of wine, or 5 barrels of liquor of some kind, and Jones & Co. had some small shipment of samples. That is a fair statement, isn't it, Mr. Graham? [181]

Mr. GRAHAM.—Yes, that is a fair statement.

The COURT.—For what place?

Mr. MANNON.—For Hamburg.

Mr. GRAHAM.—Q. So you knew the California Wine Association knew that the vessel was going to the three ports, and Rosenbergs knew it was going to Hamburg and Rotterdam, and that Jones knew it was going to Rotterdam and Hamburg?

A. Yes, sir.

Mr. MANNON.—We object to that because this witness cannot testify to it; nevertheless it is true, it is the fact.

(Testimony of Fred A. Hooper.)

The COURT.—Then the form of the question is objectionable.

Mr. MANNON.—It is the fact, though, your Honor.

The COURT.—Very well.

Mr. GRAHAM.—Q. Having been in the traffic business, as you have testified, are you familiar with what would be the proper stowage for wine, and what would be the proper stowage for general merchandise, with relation to each other?

A. Yes.

The COURT.—It is stipulated here that the manner in which this cargo was stowed was prudent. That matter is covered by stipulation.

Mr. GRAHAM.—Q. Would it have been possible to have stowed this Cardiff wine any other way and to have kept this vessel in seaworthy condition when she sailed from here?

Mr. MANNON.—That is objected to as immaterial, irrelevant and incompetent, and as covered by the stipulation.

A. It would not have been proper to stow that amount of Cardiff wine, nor would it hardly have been possible to stow that amount of wine along with the balance of the cargo on that particular ship, so that the wine could have been discharged at Cardiff and the vessel proceeded safely on her voyage without exceptional hazard nor would it have been safe to have stowed the wine for movement [182] from San Francisco across the Atlantic so that the Cardiff discharge could have been accomplished

(Testimony of Fred A. Hooper.)

safely. It would have been extraordinarily hazardous to try to distribute that much weight with the balance of the cargo the ship had, so as to have made her seaworthy for that voyage.

Q. Do you remember where the Hamburg cargo was stowed, what particular location?

A. The Hamburg cargo was stowed very largely in the shelter-deck, so as to be available for first out.

Q. Could you have, if you had wanted to, with the vessel stowed as it was, gone to the Cardiff first and discharged your Cardiff cargo and then gone on in the regular order with the vessel stowed as she was? A. Not as she was stowed.

Q. Why was that, Mr. Hooper?

A. The vessel would have been unseaworthy had she discharged the wine first as she was loaded.

Q. That is, she would not have had enough cargo, in your estimation, to carry her on?

A. She would have been considerably top-heavy, and it would have been a very hazardous voyage for her to have proceeded on her way had the Cardiff wine been taken out of the ship as she was loaded.

Q. Do you know whether Mr. Jenks, of the California Wine Association, had had experience in shipments by water?

Mr. MANNON.—That is objected to as immaterial, irrelevant and incompetent.

The COURT.—Objection overruled.

A. Yes, sir.

Mr. GRAHAM.—Q. On the amount of freight

(Testimony of Fred A. Hooper.)

being offered about the time the "West Aleta" would have arrived in Europe for return to the United States, just tell the Court generally what the freight situation was back to this country, and where most of the cargo was being offered?

A. At that particular period, both for [183] a considerable time before and a considerable time afterwards, the bulk of homeward bound cargo was offered from United Kingdom ports. There was practically nothing offering homeward from Hamburg. The homeward offerings from Rotterdam were very spotty. We might on one ship pick up a reasonable amount of cargo, and the next steamer would pick up nothing. The cargo from Rotterdam, however, was offering considerably more freely—homeward cargo—than it was from Hamburg.

Q. What would have been the effect if you had to put into the United Kingdom ports, and then come back from loading United Kingdom ports, as you testified you would have to do, on the question of rates, in general?

A. The effect would have been undoubtedly the necessity of assessing higher freight rates, by reason of the fact of the additional length of voyage, and the delays incident thereto; the shippers would not have had an opportunity, perhaps, to use the route, because rates would have been very much higher, on account of the added expenses of operation. Therefore, it was quite necessary that we operate the ships in order to keep rates down on the shortest possible turn-around, so as to keep oper-

(Testimony of Fred A. Hooper.)

ating expenses at a minimum. The reason for that, further, I might add, was that the congestion at all United Kingdom ports was such that our steamers were delayed from 10 to 15 or 20 days in getting either in or out of port, so that a second call at the United Kingdom ports would have increased our delay that much more, and without any benefit to the shippers, themselves.

Q. So that in your opinion, unquestionably the rates would have been higher had you had to put into, say, Cardiff, first, and then gone to Hamburg, and then come back to United Kingdom ports to load? A. Yes.

Q. Could you have charged at that time, if you had made the route [184] as I have just indicated, to England and Hamburg and back to England, could you have charged a higher rate than you were getting?

Mr. MANNON.—I object to that as immaterial. I don't see what this rate matter has to do with this case.

The COURT.—I will sustain the objection.

Mr. GRAHAM.—Q. This morning Mr. Mannon spoke about this deviation clause on the bill of lading, with reference to trial trips; I notice that that is stamped on there, and not printed. Can you tell me who stamped that on there?

A. We had that stamp made in our office, on the instruction of the Shipping Board, and we placed that stamp on bills of lading which we issued.

Q. What was the purpose of putting it on there?

(Testimony of Fred A. Hooper.)

Mr. MANNON.—I object to that as immaterial, irrelevant and incompetent, and the writing is the best evidence.

Mr. GRAHAM.—Mr. Mannon has called the Court's attention to this particular deviation clause, in an attempt possibly to show that it has some bearing on this case. I am getting Mr. Hooper to explain that it has no bearing in this case at all.

Mr. MANNON.—I thought you were, and that is why I am objecting. I think the writing speaks for itself.

The COURT.—Objection overruled.

A. The reason for that is this, if you please: These ships that were being turned out for account of the United States Shipping Board Emergency Fleet Corporation had a stipulation in the building contract that before they were accepted by the corporation they must stand a sea trial under load; therefore, the only way they could stand a sea trial under load was after they had been loaded with cargo. The Shipping Board, then, was responsible to the shippers while that ship was under sea trial, in case she [185] met with any accidents while on this particular deviation of her sea trial. Therefore, it was necessary that this stamp be placed on the bill of lading. But after a vessel had had its sea trial under load and had been accepted by the Shipping Board, this stamp, then, was no longer used on any bills of lading covering that particular ship. You will find that stamp on the bills of lading only in the case of new ships,

(Testimony of Fred A. Hooper.)

where the contract stipulates that the vessel must be given a sea trial under load. That is the significance of that particular stamp on that bill of lading.

Q. Now, going back to your conversations with Mr. Jenks, did he ever tell you anything in relation to whether or not this wine which they were shipping had been sold?

Mr. MANNON.—I object to that as immaterial.

The COURT.—I think so.

Mr. GRAHAM.—We want to show, your Honor, by this witness, that this wine was not, in fact, sold, and that the California Wine Association had no worry whatsoever about the date of arrival. Some of the deviation cases go to the point that it is a wrong deviation on account of the fact that goods cannot arrive at the contemplated date of arrival. I want to show by this witness that there was no contemplated date of arrival, so far as the Wine Association was concerned.

The COURT.—He has already testified on that subject, I believe.

Mr. MANNON.—The California Wine Association did retain ownership of this wine. If that is the point that counsel is after, we will concede that.

The COURT.—Is that the point you had in mind?

Mr. GRAHAM.—Yes, that is the point I had in mind. [186]

Q. Do you remember whether you told Mr. Jenks

(Testimony of Fred A. Hooper.)

or Mr. Bozeman, or Mr. Higgins that the ship was going to Rotterdam, Hamburg and Cardiff?

Mr. MANNON.—I object to the question as immaterial, irrelevant and incompetent, and as leading, and it should be differentiated as to each of the three shippers.

The COURT.—Objection overruled.

A. I distinctly remember of discussing the schedule of the ship and her ports of call with Mr. Jenks. I do not recall discussing it with Mr. Higgins, or with Mr. Bozeman. As I before stated, these gentlemen were so familiar with our service that they usually knew as well as we did, ourselves, the route a ship was going to take when they made their reservations.

Mr. MANNON.—We move to strike out that last sentence as the conclusion of the witness.

The COURT.—Motion denied.

Mr. GRAHAM.—Q. You testified about the "Effingham" and the route that she took; do you remember the route of the "Bakersfield"?

A. Yes, she made Antwerp, London and Liverpool.

Q. About when did she leave here?

A. Early in December, 1919, just previous to the "West Aleta's" voyage.

Q. When did vessels start operating from the Pacific Coast to the United Kingdom and the continent after the war, that is, in cargo business?

A. Do you have reference to our line?

Q. Yes, your line, and any other line.

(Testimony of Fred A. Hooper.)

A. Various lines started at various times after the war. The European-Pacific line started either late in 1918 or early in 1919.

Q. What other lines were there about that time?

A. The E. C. Evans Co. were allocated some ships by the Shipping Board to rehabilitate what was called the Maple Leaf Line, which was a [187] line principally to Bristol Channel ports. Then the Harrison Line, an English line, operated by Balfour-Guthrie, started just about the same time, operating to the United Kingdom ports principally, and occasionally to the continent. Then there was the Johnson Line, operating principally to Scandinavian ports, and when cargo offered for either the United Kingdom or continental ports. The Norway Pacific and the East Asiatic practically were the same as the Johnson line. A little later on, the Holland-American Line came into the field, principally to continental ports, but they found they could not fill their ships there, and they also had to take the United Kingdom ports in their schedule to fill their ships.

Q. Do you remember what the practice of these various companies was at that time, taking them in general, as to ports of call?

A. At that time they operated the same as we did; in other words, it was more or less a catch-as-catch-can proposition. It was to accept cargo as it offered, for whatever port it offered, and then advertise your ships and arrange your sched-

(Testimony of Fred A. Hooper.)

ules to suit the cargo offerings, rather than to try to advertise your schedule to make the cargo fit the ships; the ships had to fit the cargoes in those days, rather than the cargo fit the ships.

Q. At the time the "West Aleta" sailed, was there much available space on ships, or was there little?

A. The demand for United Kingdom ports, that is, London and Liverpool, was greater than for the other ports, as a rule, although, as I said before, the market was so decidedly spotty that it was very difficult to tell. You may be very fortunate, say, for a sailing in the last half of December to pick up United Kingdom cargo for your proposed voyage to London and Liverpool, and then in the first half of January, for the ship just following, your offerings for those [188] two particular ports would be decidedly light, and you would be forced, then, to go to the continent as cargo offered. The idea was at all times to keep your ships to as few ports as possible; in other words, the efforts were always made to procure and develop cargo for the minimum number of ports that you could. Your schedule of ports was only lengthened due to the conditions as they prevailed that forced you to take on another port, or three ports, or four ports, or five ports as the case was sometimes in order to fill your ship.

Q. But your ships were going full at that time?

A. The ships were going out practically full.

(Testimony of Fred A. Hooper.)

Mr. GRAHAM.—I think that is all.

Cross-examination.

Mr. MANNON.—Q. On this subject, Mr. Hooper, where the ships were going, I understand your testimony to be that you, yourself, could not tell until the ship was entirely laden where you were going to send her: Is that right?

A. No, sir, that is not right.

Q. Then will you please make your statement again; that was my understanding of your testimony.

A. The market was felt out; in other words, we had our finger on the pulse of the market, and could always determine, a month or so ahead of scheduling a ship, what ports we would want to send her to, and then she was advertised accordingly. That is the reason why you will find the advertisements in "The Guide" not running in anywhere like regular order. One ship would be for certain ports, and the following ship would be for other ports, because we knew the market conditions, and knew well in advance where the demand was going to be; we would take care of London and Liverpool, or Hamburg with this ship, and for the next ship we knew that the demand was such that we would have to send her to other ports, and [189] she was scheduled that way. It was very essential that the ports of destination be definitely determined as far in advance as possible, in order to give shippers opportunity to do business by cable, etc., and to work a cargo for that particular ship.

(Testimony of Fred A. Hooper.)

Q. Is it not a fact, though, that your business was in such a situation that in December of 1919, the situation changed every two or three days, and that you could not tell where your ship was going, and so could not make the advertisement in "The Guide" accordingly?

A. Not after a ship was once advertised and placed on berth; she sat in that position; she was not promiscuously changed around from port to port.

Q. I want to show you this letter to Rosenberg Bros. & Co., dated February 24, 1922, referring to the "West Cayote," and the period of December, 1919, and I call your attention to this particular part of it:

"We might also state that at the time no change was made in our advertisement in 'The Guide,' owing to the fact that the situation was changing every two or three days, and, therefore, the advertisement as originally placed was permitted to stand, and where any specific inquiries were made shippers were verbally advised as to the several changes as they occurred from time to time." I wish you would look that letter over and see whether that is a letter which you wrote over your signature, and sent to Rosenberg Bros.

Mr. GRAHAM.—May I ask you what you are trying to prove by the introduction of that letter, Mr. Mannon?

Mr. MANNON.—I am seeking to meet the situation with regard to the change of these ships. I

(Testimony of Fred A. Hooper.)

understood his testimony originally to be that he sent the ships wherever it was convenient. In response to my question he has testified that he got them on the berth a month ahead of time and the situation did not change. I [190] understand that this letter, written over his own signature, is to the contrary. I think the letter fairly states the situation.

A. Here is a paragraph in this letter which states:

"We also find from copies of telegrams in our files to our coast agents, that definite decision was made about January 8 or 9, to adhere to our schedule as announced in our circular letter of December 16, 1919."

That shows that on January 9th, we did do as we said we would do on December 16th.

Q. You remember writing that letter, do you?

A. I presume I wrote it, my signature is on the bottom of it.

Q. Your signature is attached to it? A. Yes.

Q. That letter that you have just read deals with the sailing of the "West Cayote" in December, 1919, or in January, 1920, does it not? A. Yes.

Q. And that was to sail when, with regard to the "West Aleta"—just before or just after?

A. After the "West Aleta."

Q. Calling your attention to this part of the letter: "We might also state that at the time no change was made in our advertisement in 'The Guide.'" You mean by that, do you not, that the advertisement

(Testimony of Fred A. Hooper.)

in "The Guide" did not correspond with where you intended to send the ship at a given time, don't you?

A. I would not say so unless I could see "The Guide" and get further reference to more of the circumstances which surrounded that particular case. We perhaps might discuss with shippers—for instance, we would advertise a ship, as we did do, I believe, and as we did once for Rosenberg,—in other words, we would announce a ship on schedule to the best of our knowledge and belief, that she would make certain ports, and would carry that advertisement along, and we would find that cargo was not developing for one [191] of the particular ports, but that someone had offered a large block of cargo, or, in other words, asked for an option to deal on a parcel of cargo for, say, another port; in the meantime, as has been said there in that letter, there was more or less conversation with these shippers up to the point of where it either developed definitely or else petered out; while this verbal conversation or dealing might have been going on endeavoring to develop a particular parcel of cargo, our ad in "The Guide" would not be changed until we made a definite decision to change the ship, and then the announcement and advices were sent out accordingly. Wherever a ship's schedule was changed, that is, a port cancelled, it was never done arbitrarily, without communication with the shipper of parcels of freight who had engaged space, it was never done arbitrarily, but was done with the consent of those shippers, they either

(Testimony of Fred A. Hooper.)

consented to transfer to another ship or were entirely agreeable to our making the change. Therefore, there might have been a lot of conversation going on in that period without any definite decision being arrived at, and in the meantime the ad read in "The Guide" as originally accepted.

Q. So you did not know, in reality, where the ship was going that you were advertising in "The Guide"?

A. We always knew that we determined to send that ship to such and such particular ports. There might have been occasions, as I have said before, where a port was added, but always with the consent and with the knowledge of the shippers involved.

Q. What I am getting at is, that there were times when the advertisement in "The Guide" that you supplied representing Williams, Dimond & Co. read to one port, or a list of ports, when you, yourself, as traffic manager, did not know whether the ship was going to that port or those ports, or to other ports? [192]

All the time that that ad was being run showing that she was going to make the particular ports as advertised, cargo was never accepted for ports other than those as shown in the advertisement, although it may have been necessary for us, by reason of the fact of not being able to get cargo for a particular port, as originally advertised, to later on change her around and cancel one port and add another one. For instance if we had a ship advertised for Ham-

(Testimony of Fred A. Hooper.)

burg, London, Liverpool, no cargo was accepted by us on that ship for Antwerp, unless her schedule was changed and the advertisement was changed in accordance with her changed schedule. We may have had that ship definitely scheduled for those three ports and at the same time been dickering for a parcel of cargo for Antwerp, but the Antwerp cargo would not be accepted until the ad was changed accordingly or the port added to the ad the day upon which that cargo may have been accepted.

Q. So that you had that cargo booked and the space reservations made for certain ports without you, yourself, knowing whether the ship was going to other ports, or not: Is that right?

A. We would definitely have cargo engaged for, say, three ports, Hamburg, London and Liverpool; if it were found that cargo was not sufficiently plentiful to fill for those three ports, if we secured sufficient cargo to fill the ship, a fourth port might have been added to the schedule.

Q. And you could not determine that until you had already booked cargo for certain of the ports?

A. We could pretty well tell where we were—not too far in advance, but we could reasonably tell far enough in advance to be safe for all purposes.

Q. This letter referring to December, 1919, says: "Owing to the fact that the situation was changing every two or three days." [193] That is to say, as your cargo possibilities became more and more apparent to you, certain offerings were given you and certain offerings were declined by you,

(Testimony of Fred A. Hooper.)

you determined where your ship was going, didn't you?

A. I believe in that case Rosenberg Bros. were anxious to accommodate them with a special parcel of rice for a port for which the ship was not scheduled. Rosenberg Bros., being very large, consistent shippers with us for the past 20 years, and being one of the heaviest patrons of our European-Pacific Line, they were entitled to every consideration and every co-operation possible; the probabilities are that Higgins was very insistent to get this parcel off, and have us add another port for the ship, but did not have sufficient to warrant us scheduling the ship for his particular parcel; it was perhaps more or less diplomatic language, that he was being nursed along there while we were trying to find cargo sufficiently in addition to make it worth while to add Rotterdam to that schedule for that ship.

Q. I wonder, Mr. Hopper, if I can get a direct answer to my question. I would like to know whether this statement in this letter is not to the effect that the ship was advertising to go to certain ports when, as a matter of fact, you, yourself, did not know what ports she was going to?

A. I will say no, sir. I will answer your question this way: As near as I can recall that letter, that ship was definitely scheduled for certain ports, and Higgins is making appeal there for the addition of another port, and the indecision was there was

(Testimony of Fred A. Hooper.)

whether or not we would add another port to the already original schedule as previously advertised.

Q. I call your attention to this statement: "We might also state that at the time no change was made in our advertisement in "The Guide," owing to the fact that the situation was changing every two or three days, and, therefore, the advertisement as originally [194] placed was permitted to stand, and where any specific inquiries were made, shippers were verbally advised as to the several changes as they occurred from time to time." Is not that a statement that you had one advertisement in "The Guide," but that you had made changes in the routing of the ship, and had not made the changes in "The Guide"? We had made prospective changes verbally, but officially we had not changed the routing of the steamer.

Q. What do you mean by "prospective changes verbally"?

A. We had a prospective offering for this port, and we might add Rotterdam to the schedule, although at the present time she was scheduled for Hamburg, London and Antwerp. Another man comes along and wants to send something, maybe, to Glasgow; we would say, "Well, we have a verbal offering for Glasgow, but the ship at the present time is scheduled Hamburg, London, Antwerp." Those were the various things that were occurring from time to time. Therefore, we would, to hold prospective business in hand, if possible, by pacifying letters such as that, and without definitely com-

mitting ourselves one way or the other, but making an evasive reply to the letter in order to hold the cargo in hand in case the proper conditions developed whereby we were justified in making the change.

Q. Then, as a matter of fact, this particular ship, as of this date, December, 1919, was routed and advertised for certain ports in "The Guide," when you, yourself, did not know whether she was going there, or not?

A. We knew—well, that is one way to put it.

Q. Is that true, or not?

A. It is true to this extent, that right to-day we have ships advertised for certain ports, and you cannot tell whether they are going to go there, or not. It is not an unusual condition in a tramp service such as we were operating [195] at that time.

Q. And it was true in the service that you were operating at that time that while you advertised your ships for certain ports in "The Guide" and other papers, you, yourself, did not know whether they were going there: Isn't that the fact?

A. No, sir, I will not say that is the fact.

Mr. MANNON.—In connection with the evidence of this witness, I will offer this letter in evidence and ask to have it marked our next exhibit.

(The letter was here marked, Libelant's Exhibit 9.)

Q. Mr. Graham has called your attention to the agreed statement of facts. I am showing you the

(Testimony of Fred A. Hooper.)

agreed statement of facts in the California Wine Association case. It has this advertisement here. This is Exhibit "E." I am showing you this one. Steamship "Effingham" for London, Liverpool and Hamburg, sails December 6th. Is that the way that ship went, do you know? A. Yes, sir.

Q. I call your attention to this statement in Exhibit "E," the advertisement in the "Daily Commercial News": "Steamer 'Cockaponset'" for Antwerp, Hamburg and Rotterdam, sails December 5."

A. That is the ship that they had the fire on, and she was cancelled from her schedule.

Mr. GRAHAM.—Will you tell Mr. Hooper what two papers those advertisements appear in?

Mr. MANNON.—The "Daily Commercial News" and "The Guide." These are advertisements in two papers. The first one, marked Exhibit "E," the European-Pacific Line advertisement from the "Daily Commercial News." The second one, Exhibit "F," is the one from "The Guide." In the questions I have asked, I was pointing to the advertisement in the "Daily Commercial News," Exhibit "E."

A. (Continuing.) I withdraw my answers to any statements in connection with the advertisement in the "Daily Pacific News." I [196] thought that was "The Guide" and that you had reference to.

Q. Then you don't know where these ships went?

A. I know this much, that the schedules, as advertised in the "Daily Commercial News" are not

(Testimony of Fred A. Hooper.)

dependable. I know that from years of experience with them. The schedule of ships as published in "The Guide" is practically infallible. The "Daily Commercial News" does not have paid men going around keeping in touch and getting their schedule of ships daily, as does "The Guide." The "Commercial News" schedule of ships may be anything, they may have them inverted, or advertised in any manner, shape or form possible. That is my experience with them.

Q. Did you have anything to do with the advertising of Williams, Dimond & Co. yourself?

A. I did in this respect, that the advertisement, so far as "The Guide" was concerned, that those advertisements were not changed or passed out unless the information came over my desk.

Q. And what, if anything, did you have to do with the routing of the routing of the vessels?

A. The routing of the vessels, the determining of the ports, and the manner in which they operated, was at my own discretion.

Q. So that you had the information and direction as to where the ships were going? A. Yes.

Q. Did you know that the vessels were advertised in the "Daily Commercial News"?

A. I did not pay very much attention to the "Daily Commercial News," because it was the same as any ordinary newspaper might run, it was not as official as was "The Guide."

Q. Did you know that there was a Williams,

(Testimony of Fred A. Hooper.)

Dimond & Co. advertisement run in the newspaper called the "Daily Commercial News"?

A. I knew there was an ad there for many years, —there was a standing ad.

Q. There had not been a standing ad there of the European-Pacific [197] Line for many years, had there?

A. From the time that line started the "Daily Commercial News" took the ad. As far as Williams, Dimond & Co. were concerned, they carried advertisements in the "Daily Commercial News" for many, many years.

Q. The European-Pacific Line commenced in 1918, after the armistice, didn't it, or 1919?

A. Yes, somewhere along in there, late in 1918, or early in 1919.

Q. So that this advertisement in the "Daily Commercial News" did not run before the line was started, so far as you knew, did it?

A. Certainly not.

Q. But you did know that the advertisement was run in regard to the European-Pacific Line, in the "Daily Commercial News"?

A. I knew there was an advertisement carried in the paper.

Q. What attention did you pay to that advertisement to see whether it was correct, or not?

A. Personally, I did not pay much attention to the "Commercial News," because I did not think it was authentic information. I did not pay much attention to the "Commercial News" advertise-

(Testimony of Fred A. Hooper.)

ment. From my definite knowledge of shippers, of many shippers, I know that they do not depend on the "Daily Commercial News," as their official publication for shipping schedules.

Mr. MANNON.—I move to strike out that part of the answer of the witness as to what other people depended on.

The COURT.—Motion granted.

A. (Continuing.) I will say this, that I did not depend in any manner or form upon the "Commercial News" for information regarding schedules. It was necessary for me, in determining the routes of my own ship, to know what my competitors were doing, and in determining what my competitors were doing and how I should govern myself I governed myself by the information which I secured from "The Guide," and I considered that as authentic and satisfactory [198] enough to determine the routing of my own ships.

Mr. MANNON.—I move to strike out that statement as volunteer, and as not responsive to any question.

The COURT.—Motion granted.

Mr. MANNON.—Apparently, Mr. Hooper, you and I are having difficulty in understanding English the same way. What I want to find out is this, whether or not you knew that an advertisement of the European-Pacific Line, of which this Exhibit "E" attached to the agreed statement of facts in the California Wine Association Case is a

(Testimony of Fred A. Hooper.)

copy, was running in the "Daily Commercial News"?

A. No, I cannot say that I knew that definitely.

Q. So that you were the traffic manager of the line, and did not know that an advertisement of the line was running in the "Daily Commercial News"?

A. I knew perhaps that an advertisement was being run there, but as to its detail I did not have time to check up every advertisement in all the papers and periodicals that we were carrying at that time daily to see that every one of them was perhaps as it should be, knowing that those papers were not, as a rule, used as a basis of authentic information.

Q. Williams, Dimond & Co. advertised in the "Daily Commercial News"; state if you know, what the reason was for the advertisement.

A. Simply for publicity.

Q. Publicity of facts contained in the advertisement, wasn't it?

A. Publicity of the fact that they were operating a steamship line to various European ports.

Q. And the advertisements contained in the "Daily Commercial News," published to the effect that Williams, Dimond & Co. were running the European-Pacific Line boats, were not accurate or authentic, were they?

A. I would say absolutely no, because the "Daily Commercial News" did not keep their advertisements up, and it was [199] an impossibility to

(Testimony of Fred A. Hooper.)

keep them posted and check their own advertisements as to what was going on. They tried to get their information every three or four or five days, or whenever they saw fit to correct their advertisements.

Q. But when they tried to get that information in this instance Williams, Dimond & Co. did not supply them the information?

A. I won't say where they got the information. I don't know. They might have got it on the floor of the Merchants Exchange, where they got lots of information.

Q. But you do know that the advertisement of the "Daily Commercial News," a copy of which is in this stipulation of facts, is not accurate?

A. If it does not compare with "The Guide" I would say it is not accurate.

Q. Did you place either of these advertisements, the one in "The Guide," or the one in the "Daily Commercial News"?

Mr. GRAHAM.—I think he has already testified on this matter, your Honor, in regard to both of these advertisements.

Mr. MANNON.—Well, Mr. Graham, do you understand that he placed these advertisements?

Mr. GRAHAM.—I don't know anything about it, one way or the other.

Mr. MANNON.—Then let me ask the witness.

Q. Did you place these advertisements?

Mr. GRAHAM.—That is objected to as already asked and answered.

(Testimony of Fred A. Hooper.)

The COURT.—Objection overruled.

A. I will say this, that Mr. Gross was in my office daily, about eleven o'clock every morning, to receive information regarding the ad that we carried in his paper, and he got the information sometimes from me personally, and sometimes from my assistant.

Q. What I want to find out is whether you placed the advertisement [200] in either "The Guide" or the "Daily Commercial News," and by "you," I mean did you have anything to do with the buying of the space, or the paying for it, in either of these papers?

A. I was an employee of Williams, Dimond & Co., and therefore had nothing to do with the payment of space there. The firm paid for the space. As an employee I furnished "The Guide" principally with the information appertaining to their advertisement. I recommended to the firm the taking of space in 'The Guide." The firm of Williams, Dimond & Co., paid the money, I didn't pay it.

Q. Did you also recommend the placing of any other advertisements? A. No, sir.

Q. Your ship carried Seattle cargo, didn't she—your line? A. Yes.

Q. And, in fact, the "West Aleta" carried some Seattle cargo, didn't she? A. Yes.

Mr. MANNON.—I want to show the witness some advertisements that appeared in a Seattle paper.

(Testimony of Fred A. Hooper.)

Mr. GRAHAM.—What is this?

Mr. MANNON.—This is the "Daily Index," an official paper of Seattle—a shipping paper. I want to ask the witness about this advertisement.

Mr. GRAHAM.—What do you expect to prove by these?

Mr. MANNON.—I cannot tell until I ask him; he is your witness.

Mr. GRAHAM.—I object to the introduction of these.

Mr. MANNON.—I do not offer them; I just want to ask the witness about them.

Q. As a shipping man, do you know anything about the "Daily Index"?

Mr. GRAHAM.—I object to all of this line of questioning on the ground that it is not proper cross-examination, and that this case has nothing to do with shipments made out of Seattle. Mr. Hooper has testified he was employed in the San Francisco office, and he has not testified that he was ever employed in the Seattle office. [201]

The COURT.—Objection overruled.

Mr. MANNON.—Q. I want to call your attention to this "Daily Index," of Seattle, dated December 3, 1919, and to this advertisement, which reads: "European-Pacific Line, through only United States Shipping Board, steel steamers, from Seattle to Cardiff, Rotterdam; steamship 'West Aleta,' December 15." Did you know that that advertisement was running?

A. No, sir, I didn't know anything about it.

(Testimony of Fred A. Hooper.)

Q. You had nothing at all to do with that, did you? A. Nothing whatever.

Q. Did you supply any information to the "Daily Index" at all? A. No, sir.

Q. Did anyone in Williams, Dimond & Co., to your knowledge? A. No, sir.

Q. Do you know whether or not Williams, Dimond & Co. paid for that advertisement.

A. I don't know. I think the agencies at ports paid their own advertising expenses, although I am not sure about that.

Q. Is it a fact that the agency of Williams, Dimond & Co. at Seattle paid for that ad?

A. I don't know who paid for that ad. It may be that the Shipping Board paid for it, because it was a Shipping Board steamer. There was one particular point of time where the Shipping Board paid for all the advertisements of their own steamers, but whether it was during this period or not, I don't know.

Q. You did not know that that advertisement was running at all?

A. I didn't know anything about that advertisement, I never saw it; this is the first time I have ever seen it.

Q. And you paid no attention at all to any advertisements that were running.

A. Not outside of San Francisco.

Q. You were a witness in the case that was tried in the east, [202] weren't you, Mr. Hooper?

A. Yes.

(Testimony of Fred A. Hooper.)

Q. You saw the agreed statement of facts there, didn't you? A. No, sir.

Q. Never read it? A. No, sir.

Mr. MANNON.—With counsel's permission I would like to have marked for identification these advertisements. These papers are from the official file of the paper, I am told, and I have to send them back. I would like to have these copies marked.

Mr. GRAHAM.—I have no objection to your having them marked, but that, of course, does not admit them in evidence.

Mr. MANNON.—In connection with the testimony of this witness we desire to have marked these advertisements in the "Seattle Daily Index."

Mr. GRAHAM.—This witness has not identified them.

Mr. MANNON.—If it becomes material as to how this ship was advertised, we hope to be able to produce from Williams, Dimond & Co. the people who paid for the advertisement. This witness said he was responsible for one advertisement.

The COURT.—I will overrule the objection.

Mr. GRAHAM.—Are they in evidence?

Mr. MANNON.—Well, I will offer them in evidence, and get someone here later from Williams, Dimond & Co.

Mr. GRAHAM.—I object to them on the ground that they are advertisements which appeared in Seattle. This case only involves shipments from San Francisco. What was advertised in Seattle has nothing to do with what shippers read here

(Testimony of Fred A. Hooper.)

in "The Guide." This certainly could have nothing to do with any shipment made from San Francisco.

Mr. MANNON.—We expect to show the utter unreliability of these advertisements. We have one advertisement in the "Daily Commercial News" and another one in "The Guide," and a third one in the [203] Seattle commercial paper.

The COURT.—The thing that bothers me about it, Mr. Mannon, is as to the authenticity of that paper. Is that admitted?

Mr. GRAHAM.—No, that is not admitted. I never saw the ad before. Mr. Hooper testified he never saw it before.

The COURT.—I am not referring to the ad, I am referring to the paper, itself.

Mr. GRAHAM.—I have no doubt that it is a paper published in Seattle, just as "The Guide" is published in San Francisco. But I still object, your Honor, to any advertisement published in Seattle.

The COURT.—I will overrule the objection.

(The paper was here marked Libelant's Exhibit 10.)

Mr. MANNON.—Q. Now, I want to have it clearly defined what the usage of doing business was of the European-Pacific Line as to what ports the boats stopped at in Europe. I understood your testimony to be that the European-Pacific Line directed those ports to whatever ports would

be most convenient to its purposes, either in discharging or in picking up cargo; was that correct?

A. Not entirely so, no, sir. Bearing in mind at all times that service to shippers must be given just as much consideration as service to the ship, or efficiency to the ship, in other words, efficiency to the ship and efficiency to the shippers had to be considered hand in hand, we could not arbitrarily throw a ship into any ports we desired without considering the effect upon our customers and our clients.

Q. What I was getting at in my question, Mr. Hooper, was this: I was getting at the question of whether the next time you sent out a ship, like the "West Aleta," you sent her to Hamburg, to Rotterdam, and to Cardiff in that order, or whether you would send her in some other order, governed by traffic conditions? [204]

A. We might very readily have sent her in a different order entirely in making the same three ports, depending entirely upon the nature of the cargo.

Q. And it might well have been, had the traffic conditions required it, that you would have sent that ship to Rotterdam first?

A. Had the cargo conditions been such that she would have had to go there in order to protect her stability and seaworthiness in the discharge and loading of cargo.

Q. And it might well have been that you would

(Testimony of Fred A. Hooper.)

have sent her to Cardiff first had traffic conditions so required it: Isn't that true?

A. I don't like the word "traffic" there, I would say cargo conditions.

Q. That is, her cargo conditions?

A. Cargo offerings.

Q. By "cargo offerings," you might have determined whether to send that ship to Cardiff first?

A. Yes.

Q. In this case you sent the ship to Hamburg first? A. Yes.

Q. So that dependent on the cargo offerings, you sent your ships to such of those ports and in such order as seemed proper in accordance with business conditions? A. Yes.

Q. You testified, as I understood you, that this stamp across the face of the bill of lading, which reads, "The vessel shall have liberty to deviate for the purpose of making any trial trips and shall pay any reasonable increased cost of cargo insurance, if any, incurred in consequence thereof," was put on the bill of lading because these were new ships?

A. Yes.

Q. As a matter of fact, this was not the first trip of the "West Aleta," was it?

A. I cannot recall that without referring back to the records. We had 18 new ships there. Just whether that was the first trip, or the second, or the third voyage, I don't know. She may have gone on her first voyage without executing her

(Testimony of Fred A. Hooper.)

[205] trial trip according to the builder's regulations.

Q. So you don't know whether this was the first or the second trip of the "West Aleta," or the third?

A. Not without referring to the records to determine that, no.

Q. So far as you know, the "West Aleta" on her first trip made Hull first, and Hamburg second —and by "Hull," I mean Hull, England; that is correct, isn't it?

A. Without refreshing my recollection as to these individual voyages, I would rather not make a definite answer.

Q. So you are unable to testify with regard to the particular ports made by the "West Aleta" at any particular time?

A. I would say that I would be able to, by checking my official records, I would be able to find out what they are. I cannot go back four or five years and recall every individual voyage of every ship we had.

Q. Where are those records?

A. Those records would be with the United States Shipping Board, or else they are in storage at the present time at one of the docks. I tried to secure those to-day at noontime, in anticipation of this question.

Mr. GRAHAM.—Do you want to know what the facts are in that connection, Mr. Mannon?

Mr. MANNON.—Yes. As I understand it, the

(Testimony of Fred A. Hooper.)

"West Aleta" went on her first voyage to Hull, England, and to Hamburg, Germany, second, and then returned to the United States.

Mr. GRAHAM.—I think that is correct.

Mr. MANNON.—Q. With regard to the "Effingham," I call your attention to these advertisements of the "Effingham" sailing for London, Hamburg and Liverpool; can you tell me where the "Effingham" went on the voyage before, if she made a voyage before?

A. If I could refer to my office records I could recall that to you and give it to you very definitely. [206]

Q. But without that you couldn't tell?

A. No, sir.

Q. And that is the fact also with regard to the "Cockaponset," you couldn't tell what voyage this was of the "Cockaponset," sailing on December 9?

A. That is the vessel that had the fire; I remember that voyage was cancelled.

Q. What voyage was that of the "Cockaponset"?

A. That might have been the first, or the second; I couldn't tell you without looking it up.

Q. You don't know what ports she went to in Europe before, do you?

A. I don't remember the ports.

Q. You could not remember the order of the ports of call now, could you?

A. Not without referring to the data.

Q. And with regard to the other ships that are noted here, the "Eelbeck," noted as homeward

(Testimony of Fred A. Hooper.)

bound, loaded at London, you couldn't tell where she touched on the outward bound trip from San Francisco, could you?

A. By referring to my office records, I could.

Q. But as matter of memory you would not know?

A. I would desire not to try to guess at it.

Q. And the "West Catan," another ship noted here, you don't know from your recollection whether the "West Catan" had gone on any previous voyage, and the order of ports, do you?

A. The "West Catan" made a number of direct voyages, London, Liverpool, and no other ports; she also made continental ports and then U. K. ports on another voyage.

Q. But now, and without referring to your records, you could not tell where she had gone?

A. I would not care to answer it.

Q. And that would be your answer in regard to other boats noted here, the steamship "Dewey," the steamship "Orani," your answer would be the same, wouldn't it?

A. Without referring to my own data I would not care to answer those questions. [207]

Q. And wherever those boats may have gone, however, you are certain that her course was determined by the cargo offerings outbound?

A. It must have been; that was what determined the voyage of the "West Aleta" to Cardiff.

Q. That wine could have been stowed on the

(Testimony of Fred A. Hooper.)

"West Aleta" so as to have permitted her unloading the wine at Cardiff, couldn't it?

A. I would say not with the quantity of wine which she had for discharge at Cardiff, plus the nature of the cargo which she had for discharge at Cardiff, plus the nature of the cargo which she had to discharge at other ports; you would not have been able to safely load that cargo with due regard to the safety of the ship, to the safety and care of the other dry cargo which you had aboard the ship. It would not have been good seamanship, nor would we have been able, perhaps, to have procured a clean [certificate of seaworthiness for voyage] bill of sale from our surveyor had we attempted to fill those holds with both wet goods and dry goods.

Q. So that the reason, or one of the reasons, for not stowing that wine so you could unload it at Cardiff, was that the ship would not sail so well after she left Cardiff had that practice been followed?

A. No, sir; that might have been given consideration, but that was not the only reason which determined the schedule of ports of that ship.

Q. I am asking you this, if that was one of the reasons.

A. That reason was given very careful consideration.

Q. And was it one of the reasons that governed you in making your determination?

(Testimony of Fred A. Hooper.)

A. I would not say it was the governing reason for determining the routing of the ship.

Q. Did it have any effect at all on your mind?

A. It perhaps had some effect on it.

Q. Are you able to make the statement that it did have some effect on your mind?

A. If I can sit down for a few moments [208] and have that stowage plan in my mind more definitely, I will be able to make more definite statements.

Q. But without refreshing your recollection in some other way, or figuring out some other reason, you cannot now tell that one of the reasons for not unloading the boat at Cardiff as she passed there was because it was better to sail the boat after she left Cardiff with that wine on board?

A. You could not determine while the vessel was in transit whether or not she should or could have gone into Cardiff. The vessel sailed from San Francisco with a very definite route in mind. She was loaded for Cardiff discharge last. Whether or not that cargo could have been manipulated around so that she could have made Cardiff, first or not, at this moment it would be necessary for me to review her entire cargo and become more familiar with every detail of it to decide whether or not that Cardiff wine could have been manipulated around the ship and properly stowed so that she could have made Cardiff first. But she left here with a very definite destination, and the cargo was

(Testimony of Fred A. Hooper.)

loaded with that definite destination in mind as she sailed.

Q. And you don't know now that one of the reasons that affected your mind in not unloading the ship at Cardiff first was the fact that you wanted the wine in her until after she left Cardiff, or until she got to Rotterdam anyway?

A. We wanted that wine in her for the purpose of the safety of the ship, the safe navigation, for her stability; secondly, it made no difference to the California Wine Association what direction or in what order of ports the wine moved. Another reason was we did not want to come back, making Cardiff, London and Liverpool, and then having to double back to London and Liverpool again.

Mr. MANNON.—I move to strike out the words in the answer, "It made no difference to the California Wine Association"; it is not responsive to the question, and is not shown to be within the [209] knowledge of the witness.

The COURT.—Motion granted.

Mr. MANNON.—Q. So the stability of the ship on her road to Rotterdam, and on her road to Hamburg, was one of the reasons that affected you in not having the wine unloaded at Cardiff?

A. Do I understand that you want to know why we did not stop this ship at Cardiff on her way over and unload the wine at Cardiff? I am trying to answer you the question as you ask it. If I don't understand you, I wish you would put me right, because I want to understand you in giving you

(Testimony of Fred A. Hooper.)

my answer, and I don't want to understand you in one way when you are asking something else.

Mr. MANNON.—Mr. Reporter, will you please read the last question to the witness?

(Question read by the Reporter.)

A. I will say "No," to that question.

Q. And the stability of the ship, then, into Rotterdam, or into Hamburg, had nothing at all to do with fact that she did not unload the wine at Cardiff?

A. I will answer that both yes and no; that is a question that can be answered both ways, and neither way is proper.

Q. Will you please explain your answer?

A. You asked the question as to whether or not we could have stopped that ship at Cardiff and discharged the wine, to which I replied no. You then asked whether or not the stability of the ship would have been affected if the wine was discharged at Cardiff; that is, it would have been affected had not the cargo that was left in the ship been restowed, and the ship perhaps been put in such shape that she could have taken ballast in order to have made her seaworthy from Cardiff to Rotterdam or Antwerp. On the other hand, if the cargo were taken out at Cardiff as it was stowed, it would [210] have meant the discharge of considerable of the shelter-deck cargo, in which case, unless the lower holds had been rearranged, the ship would have been unseaworthy.

(Testimony of Fred A. Hooper.)

The COURT.—We will adjourn now until to-morrow morning.

(An adjournment was here taken until to-morrow, Tuesday, December 30, 1924, at 10:00 o'clock A. M.)

[Endorsed]: Filed Jan. 17, 1925. [211]

Tuesday, December 30, 1924.

FRED A. HOOPER, cross-examination (resumed).

Mr. MANNON.—Q. Mr. Hooper, we had been discussing, at the time of adjournment yesterday, the question of the stowage of the ship. I take it that the stowage of the ship was under the direction of the ship's officers, was it not?

A. Under the direction of the ship's officers and the surveyor.

Q. Is it possible, with a ship like the "West Aleta," to load her with the quantity of wine she had for Cardiff and to unload that at Cardiff, do you know?

A. In my judgment I would say no. If I were handling that ship officially and was responsible from an insurance standpoint, and had to assume the responsibility from the insurance standpoint, I would say no, that there was too much wine on that ship to have loaded her for first discharge at Cardiff.

Q. Your testimony then, practically, is to the effect that given a ship of the tonnage of the "West Aleta," and given the amount of wine for Cardiff

(Testimony of Fred A. Hooper.)

that there was here, you could not take that wine in San Francisco on that ship in any way and unload it at Cardiff: Is that correct?

A. That is correct, so far as the question you asked me is concerned, but when you take into consideration that that ship had other cargo for other ports, then I would answer no.

Q. Now, let us be perfectly clear about this, Mr. Hooper: You have, say, 11,000 barrels of wine, approximately, to go to Cardiff; you have a ship of the type of the "West Aleta"; you are familiar with what the wine is like to handle as cargo; you are familiar with the "West Aleta"; could you take the "West Aleta" and take that 11,000 barrels of wine and land it out of San Francisco [212] for Cardiff in any way direct?

A. For a direct shipment, with 11,000 barrels of wine, which is in the neighborhood of 2,700 tons, unless the ship was well ballasted with full double bottoms of oil, and all her fresh water tanks full, I would say it would be a very hazardous voyage to send the "West Aleta" to Cardiff with only the 11,000 barrels of wine in her; she would be too light.

Q. As a matter of fact, is it not ordinary practice to sail a ship of the type of the "West Aleta," with that amount of cargo, across the Atlantic Ocean, one way or the other?

A. With the amount of dead weight cargo, 2,500 tons, it perhaps is done and has been done.

Q. And for homeward-bound cargo, did you not

(Testimony of Fred A. Hooper.)

do it with these ships while you were operating them?

A. We were compelled to do it, we were obliged in many instances to stiffen the ship to assist.

Q. And if you could haul cargo of that character from the European side to the American side in that way, then you could haul it back from the American side to the European side, if necessary, could you not?

A. Yes, but, as I have said, it is a hazardous voyage for the ship, because she is so light.

Q. And if you used sufficient ballast, that would not be hazardous, would it?

A. No, that would help.

Q. So to get back to my question, you could take a ship like the "West Aleta" and put 11,000 barrels of wine in her and take it to Cardiff, couldn't you?

A. You could, taking into consideration and doing, as I have said before, by giving her full fuel in her double bottoms, and all her fresh water tanks filled, and perhaps some ballast with it—it may not be necessary to take ballast.

Q. And, likewise, it would have been perfectly practicable, with the "West Aleta" carrying the cargo which she carried, for her to [213] have left San Francisco with that cargo, assuming the proper stowage of the vessel, for that vessel to have gone first to Cardiff and unload her cargo at Cardiff, as much as was destined for that port, and

(Testimony of Fred A. Hooper.)

then to have gone to Rotterdam and unloaded as much as was destined for that port?

A. I would say no. That was just the point I made originally with you; you asked the question first if we could put 11,000 barrels of wine on her, and go to Cardiff and discharge her. Yes. But with the additional cargo for the other ports that was in that ship—well, it might have been done. I answered the question yesterday that I would have to look the stowage plan—the tonnage—over, and determine just how stowage could be made in order to keep the dry goods and the wet goods separate to make your discharge at Cardiff, and still have your ship in such shape that you could have put ballast into her without running the danger of damaging the cargo beyond, or whether or not it would have been possible to have so loaded the ship, the trunkways and one thing and another, so as to separate your cargo and make it possible to discharge that particular cargo at Cardiff and have been safe to have gone on to Rotterdam and to Hamburg.

Q. This vessel had approximately 1,600 tons of cargo for Rotterdam and approximately 660 tons of cargo for Hamburg; as a shipping man, would it be possible to take that ship at Cardiff, with the 1,600 tons for Rotterdam, and the 660 tons for Hamburg, and take your cargo from Cardiff to Rotterdam and there unload, and then go from Rotterdam to Hamburg and unload the Hamburg cargo?

(Testimony of Fred A. Hooper.)

A. Provided your cargo was of a nature that you could assimilate it and load it in such a way that you would avoid possibility of damage to the cargo that was left in the ship. There is a difference between 2,500 tons of cargo and 2,500 tons of wine in barrels when you are considering the stowage of the ship. 2,500 tons of [214] cargo is one thing, and 2,500 tons of wine is an entirely different parcel to be dealt with, and must be dealt with as wine and not simply considering it as 2,500 tons of cargo.

Q. I asked you this morning about 11,000 barrels of wine. You have testified that you were competent to take that ship, stow the 11,000 barrels of wine on her, and take her into Cardiff.

A. With that alone, but not mixing it with other dry cargo that was on the ship for points beyond. I think I made myself in my answer very definite on that point, also.

Q. So you are perfectly clear you could take the wine to Cardiff?

A. Take the wine to Cardiff, provided it had no other cargo aboard the ship. I answered that question very clearly and definitely, yes, the wine could have gone to Cardiff, but the "West Aleta," with the cargo which she had, including the 11,000 barrels of wine, could not, in my opinion, have been loaded satisfactorily and safely for Cardiff discharge first and then proceeded on to Rotterdam and to Hamburg with the balance of the cargo aboard. If she had the 11,000 barrels of wine only,

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(Testimony of Fred A. Hooper.)

that question can be answered from a different standpoint entirely.

Q. What is the reason that could not be done with the cargo?

A. Because the capacity of the ship was such and her construction was such that in my opinion you could not have satisfactorily distributed the Cardiff wine throughout the ship with—and I want you to get this—with the class of cargo we had for Rotterdam and for Hamburg and make a satisfactory stowage of the ship for discharge at Cardiff, first. Your Hamburg and your Rotterdam cargo, consisted of considerable light stuff, which could not have been stowed under wine; your wine would have pressed and broke it down, and you would soon have your cargo adrift, which would have perhaps capsized your ship.

Q. Where would you stow the wine?

A. Wine is invariably given, as [215] near as possible, the lower hold stowage, and unless your ship is sufficiently stiff to take your wine or heavy dead weight cargo, whether it be wine or any other class of dead weight cargo, you could not put wine alone in the shelter-deck of a ship and put light general merchandise below; it would not be safe or proper stowage from a weight standpoint. That is the first thing. And the second thing is, your wine is what is termed "wet cargo," and in case of broken packages your wine would run down and damage your general merchandise cargo and you are up against severe claims which the ship must

(Testimony of Fred A. Hooper.)

stand. You cannot stow wet cargo on top of dry cargo.

Q. And I take it that testimony applies also to the stowage of bean oil?

A. Bean oil is considered wet cargo. Unless, as I say, your ship is in such shape and she is sufficiently stowed so that you have her well ballasted, or well stiffened, ordinarily oil would go below; but there are instances when you can stow a limited amount of wet cargo under your shelter-decks by properly protecting it with dunnage and sawdust, and by putting it in the wings of the ship where, in case of leakage, she will drain off.

Q. And I take it that your testimony with regard to proper stowage applies to brandy, as well as to bean oil and to wine: Is that correct?

A. That is correct.

Q. What weight did this ship have on board, do you know?

A. I cannot recall. I know when she left the canal she was supposed to have had full bunkers, which I believe was in the neighborhood of some 13,000 barrels of oil, perhaps 150 tons—that is long tons—say about 190 tons of fresh water; about 200 tons of stores. Her oil would have been about 1,200 or 1,300 tons, I believe, something in that neighborhood, and her cargo about 4,000 odd tons.

Q. The cargo on the "West Aleta" consisted in the main of this wine, [216] the brandy, the bean oil, and the rice, didn't it, or do you know?

(Testimony of Fred A. Hooper.)

A. I believe it did. Wine was the great bulk of the cargo, wine and rice.

Q. You remember testifying in the Eastern case before Judge Hand, as a witness, do you not?

A. Yes.

Q. I have here a certified copy of the transcript. I want to show you this portion of it, reading from page 44:

> "Q. And general cargo, rice, and nutmeg, etc.?
>
> "A. Well, rice is ordinarily dead weight cargo, as well, and that should go in the lower holds, but you seldom would put rice in with what we term wet cargo, this barrel goods, oil."

Do you remember giving that answer at that time? A. Yes.

Q. And it is correct, is it not? A. Yes.

Q. What was the cargo-carrying capacity in dead weight tons of the "West Aleta," if you know?

A. I think she was 8,800 deadweight.

Q. The cargo that was on the "West Aleta" was between 4,000 and 5,000 tons, was it not?

A. I would prefer, if we are going to get down to try to check her weight against the deadweight of the ship, if it is possible, to refresh my memory from definite figures. She has—

Mr. GRAHAM.—I think that is in the stipulation of facts, Mr. Mannon.

Mr. MANNON.—Yes, I think that is in the stipulation. I simply wanted to bring out that the

(Testimony of Fred A. Hooper.)

carrying capacity was 8,800, and she had between 4,000 and 5,000 tons of cargo.

A. (Continuing.) You understand that the 8,800 deadweight does not mean that her capacity for cargo is 8,800; you understand that, don't you?

Q. I wanted you to testify to that; I understand you have so testified.

A. The 8,800 deadweight means her total lifting [217] capacity, including her oil and fresh water, and stores, supplies, etc., the weight of which must first be deducted from her deadweight before you can arrive at the amount of tonnage you can put in the ship. And also that varies according to your oil and the length of the voyage accordingly.

Q. I asked you, then, a question as to what the cargo-carrying capacity in deadweight tonnage of that ship was.

A. The cargo-carrying capacity of a ship varies according to the voyage which she is going to make, and according to the amount of stores, water and oil you have to put aboard the ship; the same ship, in an intercostal voyage from here to New York will carry a greater deadweight—it is possible to put a greater deadweight cargo into her than the same ship would take in going on a voyage to Europe. And perhaps that same thing will vary again if you wanted to send that ship to Valparaiso. It all depends on what voyage you are sending the ship on, as to what her deadweight carrying capacity is.

Q. Of course, you are conversant with the "West

(Testimony of Fred A. Hooper.)

Aleta," or, rather, you were at the time she went out of here with this cargo on board?

A. In a general way.

Q. Are you conversant with her sufficiently to make a statement as to what cargo in tons she was capable of carrying at that time to Europe.

A. To Europe, with full bunkers—you have to give me a problem which must be made clear; you cannot ask a question as to what she could take to Europe unless you also say under what conditions. If you will give me the conditions under which you want to put a cargo into the ship; I will endeavor to give you, to the best of my ability, an answer as to what tonnage she might lift.

Q. Take the conditions under which she left San Francisco. You have been testifying about the showage of the ship, and about a [218] lot of details; in order to give that detail you have to know about the ship, don't you? A. Yes.

Q. And about her cargo? A. Yes.

Q. And about where she was going? A. Yes.

Q. Now, in the same way, bearing in mind the same ship, the "West Aleta," going out of San Francisco, destined for ports she was directed to go to, can you tell us what her cargo-carrying capacity in tons was?

A. Yes, but I cannot carry all the figures in my mind. If I can have a scrap of paper I will figure it out for you as closely as possible. I would say in the neighborhood of 6,700 short tons, tons of 2,000 pounds, would be her carrying capacity.

(Testimony of Fred A. Hooper.)

Q. These ships that were allocated to you by the Shipping Board were all of the 8,800-ton variety ships, were they not?

A. No, sir; there were a number of 8,800, there were some 9,400, some 9,600, some 10,000, and some larger than that.

Q. As to these 8,800 ton ships that you had to run to Europe, the most important thing you had to know about them was how much cargo they would carry, wasn't it?

A. Certainly, I had to know how much cargo she would carry, both from her weight standpoint, as well as from her measurement standpoint. That must be taken into consideration, too, along with her deadweight. You may have a ship filled with bulk cargo which will not anywhere reach her deadweight capacity. You might have a ship that would be down to her marks long before her space is filled up. So you have to consider your cargo both from a deadweight standpoint, as well as from a measurement standpoint. You could put 6,700 weight tons in that ship, the chances are, but you could not put 6,700 measurement tons in the ship—that is, I mean of bulk cargo. Your cargo, as an ordinary thing—cargo to Europe, as an ordinary thing, will stow on an average 60 to 70 feet to the ton. [219]

Q. It is a fact so far as you know, is it not, that the "West Aleta" was making the second voyage out of this port for Europe at the time she left here? A. Yes.

(Testimony of Fred A. Hooper.)

Q. On her first voyage she had gone to Hull first, and then to Hamburg, had she not?

A. I believe so. I tried to check that for you this morning, Mr. Mannon.

Q. And then came back to San Francisco, to Pacific Coast ports? A. Yes, sir.

Q. It is a fact also, is it not, that on June 27, 1919, and cognate dates, the "West Aleta" was advertised, however, for other ports; I mean by that she was advertised in "The Guide" to go to Copenhagen direct. You probably don't remember that at this time, Mr. Hooper, but that is a fact according to the file of "The Guide."

A. Well, if you say so, Mr. Mannon, I am willing to admit it.

Q. I merely wanted to call your attention to the fact that the advertisement at that time did not check with where you actually sent the ship; have you any explanation of that?

A. Other than the Copenhagen cargo which, perhaps, was originally offered to warrant us in announcing the ship for there, to go there, for some reason or other—what we term in shipping circles—fell down, it did not develop, and we were obliged to cancel the Copenhagen call and seek cargo in other directions. Being a tramp line, it was our privilege to do that.

Q. The European-Pacific Line, as a matter of fact, was not established until June 7, 1919, was it?

A. I believe we had ships out in March, 1919, according to the records that I located.

(Testimony of Fred A. Hooper.)

Q. What ships were they?

A. I prepared a statement for you as requested last night, Mr. Mannon, you and Mr. Graham.

Q. This record that you provided here is one which shows what ships of the European-Pacific Line had gone out prior to the "West [220] Aleta"?

A. It shows the ships we had sent to Europe prior to the "West Aleta" in general merchandise cargo. I want that statement qualified on this point, that during the war we sent, or I sent a great many ships to Europe. In other words, I want to qualify so that it will be understood that I had experience in European ports prior to the sending of these particular ships.

Q. What I am getting at is, Mr. Hooper, the origin or genesis of the European-Pacific Line.

A. I understand that; I say yes.

A. And these ships constitute all of the ships of that line that had gone out of San Francisco for European ports? A. Prior to the "West Aleta."

Q. And these ports that you have given are the ports of destination, San Francisco being the port of departure?

A. San Francisco, in most every instance, via San Pedro; I just show the San Francisco date. Practically every ship went to San Pedro, and then proceeded from San Pedro.

Q. And some of them came from the north, also, didn't they?

A. Some of them did, and some of them did not;

(Testimony of Fred A. Hooper.)

some of them originated here. In nearly every instance, though, they went to San Pedro.

Q. Perhaps it will aid to read this into the record; will you just read that into the record?

A. If you want it in the order of dates I will have to check it.

Q. Well, for instance, what is this?

A. This is Voyage 50, "Bakersfield," from San Francisco, December 7, 1919, for London.

"Effiingham," Voyage 50, from San Francisco, December 17, 1919, Hamburg, London, Liverpool.

"West Cayote," Voyage 50, from San Francisco, September 7, 1919, Havre, London.

"West Catan," Voyage 50, from San Francisco, October 21, 1919, Havre, London. [221]

"Cockaponset," Voyage 50, December 28, 1919, Havre, Antwerp, Thameshaven.

"Consumset," Voyage 50, August 28, 1919, Liverpool.

"Dewey," Voyage 50, November 18, 1919, Bristol, Liverpool, London.

"Eelbeck," Voyage 50, September 6, 1919, Liverpool, London.

"Orani," Voyage 50, October 29, 1919, London, Liverpool, Glasgow.

"Coloma," Voyage 1, May 29, 1919, Hull.

"West Aleta," Voyage 50, August 10, 1919, Hull, Hamburg.

"Wakanna," Voyage 1, March 29, 1919, Falmouth, Danzig.

(Testimony of Fred A. Hooper.)

"West Aleta," Voyage 51, January 6, 1920, Hamburg, Rotterdam and Cardiff.

Q. Where you say "Voyage 50," the "50" designates the first voyage of the ship?

A. Yes; that is the number we started with.

Q. And "51" denotes the second voyage?

A. Yes, the second voyage.

Q. I notice in two of these, the "Coloma" and the "Wakanna," you designate them as Voyage 1; what difference does that make?

A. No difference, except that we adopted a different method of indicating the original voyage later on.

Mr. MANNON.—In connection with the testimony of this witness, I offer this list in evidence and ask that it be marked our exhibit next in order.

(The document was here marked Libelant's Exhibit 11.)

Q. You said in your direct examination that you had a conversation or conversations with Mr. Jenks in connection with the space engagement for these vessels, telling him something about where the vessels were going; am I correct in that?

A. Yes.

Q. Bearing that in mind, I wanted to call your attention to this letter of November 25, 1919, and ask you if you wrote that letter to the California Wine Association, and if it has to do with this [222] space engagement we are talking about here.

A. I did not write this letter, nor did I sign it; my stenographer wrote it without dictation, and in

(Testimony of Fred A. Hooper.)

the ordinary course of handling details. That is her signature. It was written without dictation.

Q. Are you able to state that that letter did come from your office? We produce it from the files of the California Wine Association. (Addressing Mr. Graham:) Do you make any point about it, Mr. Graham?

Mr. GRAHAM.—No, I do not.

Mr. MANNON.—I want to offer the letter in evidence.

A. Yes, that came out of my office.

Q. And it bearing the date November 25, your space engagement was sometime earlier, I presume —either that day or earlier?

A. That day or earlier, yes.

Mr. MANNON.—I offer this letter in evidence and ask that it be marked Libelant's Exhibit 12.

(The letter was here marked Libelant's Exhibit 12, and is as follows:)

LIBELANT'S EXHIBIT No. 12.

(Letter-head of Williams, Dimond & Co.)

"San Francisco, November 25th, 1919.

No. 500–EO

"California Wine Association,
216 Pine Street,
San Francisco.

"Gentlemen:

SS. 'WEST ALETA.'

"This will confirm reservation of space for your account covering shipment of 10,000 barrels of Wine to be forwarded from here to Cardiff on the

(Testimony of Fred A. Hooper.)

above-named steamer. This will also confirm reservation of space for your account covering shipment of 4,000 barrels of Wine to be forwarded from here to Rotterdam on the above-named steamer.

"The rate on Wine, in barrels, is $2.10 per 100 lbs., applying [223] from ship's side San Francisco to ship's side Cardiff, and $2.35 per 100 lbs., applying from ship's side, San Francisco, to ship's side Rotterdam.

"Thanking you for this business and awaiting your further pleasure, we remain

"Yours faithfully,

"WILLIAMS, DIMOND & CO.,

"Managers & Operators,

"F. A. HOOPER, O.,

"General Freight Agent."

The WITNESS.—May I see that letter again, please? That is all right.

Mr. MANNON.—Q. Have you seen what you desire in connection with it, Mr. Hooper?

A. Yes.

Q. What was the name of the individual who signed that letter? A. Miss E. M. Olsen.

Q. What name is it signed by?

A. F. A. Hooper, per O.

Q. That was in the ordinary course of business, I take it?

A. In the ordinary course of detail, yes.

Q. When you had this conversation or conversations with Mr. Jenks of the California Wine Association, who else were present?

(Testimony of Fred A. Hooper.)

A. We had several conversations. In some cases Mr. Jenks was alone; in other cases, Mr. Sheehan, his assistant, was present. Some conversations were held as to detail, that is, pertaining to minor details, with Sheehan, himself.

Q. Where were they held, do you know?

A. In Mr. Jenks' office, so far as the personal conversations were concerned. There were telephone conversations; where Mr. Jenks was when he telephoned, I don't know, but I presume in his own office.

Q. You mentioned other lines that were running out of San Francisco at or about the time the European-Pacific Line was running; one of them that you mentioned was the Harrison Line: You remember that, don't you? A. Yes. [224]

Q. The Harrison Line, as a matter of fact, only ran its ships to United Kingdom ports, did it not, prior to the time the "West Aleta" went out?

A. Well, I would not say that they only ran to the United Kingdom prior to the time the "West Aleta" went out; I do not know definitely, but I do know that they ran to both United Kingdom and Continental, somewhere along in that time; whether it was before or after the "West Aleta" voyage, I do not know.

Q. Then, so far as you know, it is a fact, is it not, that the Harrison Line ships only ran to United Kingdom ports, either London or Liverpool, in the year 1919 and prior to the time the "West Aleta" went out?

(Testimony of Fred A. Hooper.)

A. No, I won't say that that is a fact. I don't know that.

Q. You don't know whether it is a fact, or not?

A. No.

Q. So that in you testimony of yesterday, your testimony of yesterday would have to be modified to that extent, so far as the Harrison Line boats were concerned, that they did not run to the Channel ports at all, other than the English ports, and the only English ports they ran to were London and Liverpool, so far as you know?

A. No, I say they also included continental ports. I do not know as to the dates, I cannot give you the dates, but I know that they ran to continental ports occasionally, as well as their regular U. K. ports.

Q. It will save time if you can give me an answer to the question, Mr. Hooper. I want to know whether you are willing to testify that in the year 1919 and prior to the time the "West Aleta" went out on this voyage the Harrison Line sent any ships out of San Francisco to any European ports other than London and Liverpool?

A. I do not know, but I believe so.

Q. You have no knowledge on the subject?

A. No direct knowledge.

Q. Do you want to be understood as testifying that the Harrison Line, in the year 1919, sent any ships out of San Francisco to [225] any ports other than London and Liverpool, in Europe?

A. I am willing to be recorded as saying this,

(Testimony of Fred A. Hooper.)

that definitely I do not know, but I believe they did at or about that time.

Mr. MANNON.—If your Honor please, I move to strike out so much of the answer as saying "but I believe they did." I am entitled to an answer one way or the other.

The COURT.—I will deny the motion.

Mr. MANNON.—Q. Referring to the Harrison Line, in the year 1919 were there any ships that went out of San Francisco to European ports carrying cargo other than the "Professor," the "Crown of Toledo," the "Musician," the "Crown of Galicia," the "Orator," the "Crown of Cadiz," and the "Architect." A. I don't know.

Q. Did any one of those ships that I have mentioned touch at any port other than London or Liverpool. A. I cannot recall at this late date.

Q. But you are not able to testify that any ships of the Harrison Line did touch at any ports other than London and Liverpool, out of San Francisco, in the year 1919, are you?

A. At this late date I cannot recall.

Q. Another of the lines you mentioned was the line that was run by E. C. Evans & Co., to replace the Maple Leaf Line: You remember mentioning that line, don't you? A. Yes.

Q. Will you state whether you have any knowledge as to whether any ships of that line in the year 1919 went to any European ports other than United Kingdom ports?

A. I cannot recall at this time. I will say this,

(Testimony of Fred A. Hooper.)

I do not think they ran to any place but United Kingdom ports. Evans was purely a Bristol Channel operator. I do not think they went to the continent; they may have, but I don't think so.

Q. The fact is that you don't know where those ships went, isn't it?

A. I am not able to remember. [226]

Q. And so you cannot testify about it?

A. I can testify to the best of my knowledge and belief, but I cannot be very definite about it.

Q. Were there any ships, if you know, out of San Francisco, by the Evans Line, other than the "Darrah," the "Astoria," the "Berrington," and the "Fort Logan"?

A. I cannot recall. I know that a couple of those ships we were managers of, but they were operators of.

Q. So you cannot name any other ships of the Evans Line, or any other ships, that went out of San Francisco, other than the ones I have just named?

A. I have no way of having access to their confidential or other records to see what ships they had an interest in.

Q. All of these ships that I have named went to but a single port, that is, each of those ships went to but one port in the United Kingdom?

A. The two ships that we were managing operators of, those I am in a position to know something about, went only to one port, I believe; the other ships operated by Evans I was not sufficiently in-

(Testimony of Fred A. Hooper.)

terested in them to follow their schedule through all their United Kingdom ports. I know in a general way they went to Europe, to the United Kingdom.

Mr. MANNON.—I move to strike out that answer, all of it, on the ground that it is not responsive to the question.

The COURT.—Motion granted.

Mr. MANNON.—Will you read the question Mr. Reporter?

(Question read by the Reporter.)

A. I will give you a fifty-fifty answer; yes on two of them; two I don't know.

Q. And those ships all carried full cargoes of barley, did they not? A. I do not know.

Q. You testified about the East Asiatic Company having ships out [227] of this port in the year 1919 prior to the sailing of the "West Aleta"; it is a fact, is it not, that there were not any ships out of this port of the East Asiatic Line in the year 1919 for any ports except Scandinavian ports?

A. Did I answer the question—was your question put to me that the East Asiatic operated ships in 1919, or was it just the lines that operated to Europe?

Q. Perhaps you had better state what the fact was in the year 1919 about the East Asiatic Company.

A. Well, I cannot recall just what the East Asiatic Company did in the year 1919; they were European operators.

Q. You just don't know whether they had any

(Testimony of Fred A. Hooper.)

ships out of San Francisco for any European port in the year 1919, do you?

A. I just can't recall at this time.

Q. As a matter of fact, then, referring to the East Asiatic Company, the "Siam," which left San Francisco on November 21, 1919, is the only ship of the East Asiatic Company out of this port for European ports in the year 1919: Is that correct? A. I cannot recall.

Q. You don't know? A. I cannot recall.

Q. Can you recall any others? Did you answer that question, Mr. Hooper?

A. I am trying to get you. No, I would rather not attempt to give any definite dates of sailing or name any particular ships; I cannot remember at this late date.

Q. So you just don't know?

A. I just cannot recall, I cannot remember.

Q. And when you say you cannot remember you mean you don't know at the present time?

A. I mean I cannot remember at the present time. I know they had services operating, but as to what dates their ships left, and the names of the ships, and what ports they went to, and the cargoes they carried, I cannot recall at this time. [228]

Q. You say that this line to which I have just referred, the East Asiatic, had a service out of San Francisco during the year 1919 for European ports.

A. I did not say they had a service during 1919.

Q. That was what I want to find out. Will you say they did not have one during 1919?

(Testimony of Fred A. Hooper.)

A. I did not say they did not have one, either I said they were European operators, but I don't recall whether their sailings occurred in 1919 or not.

Q. You just don't know whether the East Asiatic operated out of this port in 1919, do you?

A. I know this, that they maintained their office and organization during 1919, and whether they sat doing nothing, or operating ships I don't know; but their organization was full and complete in 1919.

Q. Is it not a fact that the office organization of the East Asiatic Company commenced in San Francisco in the month of October, 1919?

A. No, I believe the East Asiatic, if I can remember correctly, was in—oh, I don't know as to just when they started; I know they had an organization here at that time.

Q. So that you just cannot testify about that. Now, what is your situation in regard to the Norway-Pacific Line; are you able to testify about their running any ships out of San Francisco for European ports in the year 1919?

A. I don't recall at this time what ships they sailed in 1919 or whether they sailed any, but they were in the service prior to the war and since the war.

Q. What is your situation with regard to the Johnson Line. Are you able to testify whether they operated any ships out of San Francisco for European ports in the year 1919?

A. I believe the Johnson Line did. They were

(Testimony of Fred A. Hooper.)

very active right along. They may not have sent a ship out—I am hazy as to that—but their organization was here at that time. [229]

Q. Give me your recollection on that, Mr. Hooper, did they or did they not send a ship out of San Francisco to European ports in the year 1919?

A. Oh, I cannot tell you definitely at this time.

Q. And your situation is the same with regard to the Holland-American Line, is it?

A. I don't think the Holland-American Line was in operation here in 1919; I think they came into the picture later than that.

Q. Do you know who had charge of advertising for Williams, Dimond & Co.?

A. Partially myself, and partially—just what do you mean, in charge in what way?

Q. In charge of putting advertisements in a newspaper for shipping.

A. I did part of it, and Mr. Howland did part of it.

Q. Is he with you now, do you know?

A. He is with the American-Hawaiian Steamship Co. now.

Q. In what papers did you put advertisements, if any? A. I handled principally "The Guide."

Q. And that is true in regard to paying "The Guide," or O. K.-ing the bills for "The Guide," is it?

A. In some instances I O-K.ed the bills, and in some instances I did not.

(Testimony of Fred A. Hooper.)

Q. Who had charge of the stowage of the "West Aleta" on this voyage?

A. Captain Rinder was the surveyor for that ship, together with myself handling stowage, together with the ship's officers and the port captain —Captain Will Curtis.

Q. What was the reason the "West Aleta" went to Hamburg first?

A. Because that is the way she was scheduled to go.

Q. What was the reason she was scheduled to go to Hamburg first?

A. On account of cargo offerings; furthermore, the class of cargo that was in the ship.

Q. On account of what cargo offerings?

A. The general cargo offerings outside of the wine for Cardiff. [230]

Q. Did that have anything to do with any of the homeward-bound cargo? A. Quite a good deal.

Q. Where was the homeward-bound cargo that affected the schedule of the ship?

A. The homeward-bound cargo was always engaged on the other side; the most fertile ground to pick up homeward-bound cargo at that time, we had a slight chance to get some at Rotterdam, and the balance, whatever we could get at that time, which was very little, if any, the best ports were the United Kingdom ports, Channel ports.

Q. Why was the ship scheduled to go to Rotterdam after she left Hamburg?

A. That was more desirable because we had

(Testimony of Fred A. Hooper.)

Rotterdam cargo for discharge there, and the probabilities were that we were more apt to get a little outward cargo at Rotterdam. The expectations were not very great, we did not expect much.

Q. Where did you expect to get the cargo, though, really—at Rotterdam?

A. We expected to get the bulk of our cargo at that particular time when the "West Aleta" returned in early 1920, we expected to get the *the* bulk of the cargo, whatever we could get, at United Kingdom ports. Europe was torn at that time, and was not producing very much.

Q. When was the "West Aleta" scheduled first to go to Hamburg at all, if you know, upon this voyage?

A. I cannot recall the exact date at this time.

Q. You are the particular individual who directed the ship to go to Hamburg, are you not? A. Yes.

Q. And, as a matter of fact, did you not direct her to go to Hamburg first on December 3, 1919?

A. I cannot recall that now. That is a mere detail that would not make much of an impression on my mind.

Q. As a matter of fact, you had originally destined that ship for Cardiff and for Rotterdam, and not for Hamburg, had you not? [231]

A. I cannot recall that, either, because the ship went to different ports, and it is very difficult, after a lapse of four years' time, to try and recall why I said Hamburg for this ship on December 5, or on December 2d, or on any other date.

Q. Possibly I could refresh your recollection a

(Testimony of Fred A. Hooper.)

little. As a matter of fact, the reason the ship went to Hamburg was because Rosenberg offered you some rice to go to Hamburg?

A. That may have been a governing factor.

Q. And they made that offer to you on December 3, 1919. A. I don't know.

Q. So far as you know that may be the fact, but you are not clear about it?

A. I do not know when they offered that; I could not state.

Q. In that list, Mr. Hooper, I notice the "Coloma" went out at the end of March, 1919, on Voyage 1; she went to Falmouth and to Danzig; was that a general cargo ship, or a relief ship?

A. Her Danzig cargo, I am satisfied, was American Red Cross cargo, as near as I can remember now. I think she went into Falmouth for orders or for fuel. I don't ever recall her handling cargo to Falmouth. She went into Falmouth for some purpose other than cargo, I believe, either fuel, or for orders, or something of that kind.

Mr. MANNON.—That is all right.

Mr. GRAHAM.—With your Honor's permission, and if it meets with the approval of Mr. Mannon, I would like to put Mr. Chandler on the stand for about five minutes before taking up the redirect examination of Mr. Hooper.

Mr. MANNON.—That is all right.

The COURT.—It is satisfactory to me.

(The witness was here temporarily withdrawn.)

[232]

TESTIMONY OF C. H. CHANDLER, FOR RESPONDENT.

C. H. CHANDLER, called for the respondent, sworn.

Mr. GRAHAM.—Q. With whom are you now associated, Mr. Chandler?

A. Sudden & Christenson.

Q. With whom were you associated in 1919 and 1920? A. Sudden & Christenson.

Q. What is your position and what was your position at that time?

A. My present position is manager of the shipping department.

Q. What was your position in 1919 and 1920?

A. Manager of the New York office.

Q. In New York? A. In New York City.

Q. When did you return to San Francisco?

A. June, 1920.

Q. How long had you been in New York previous to that time? A. June, 1919.

Q. Then you were in San Francisco before June, 1919? A. Yes.

Q. You were away approximately a year, then?

A. Yes.

Q. And during that year when you were away, you were able to familiarize yourself fairly well with New York shipping conditions, were you not?

A. Yes, in a measure.

Q. How long have you been concerned with shipping matters in San Francisco?

(Testimony of C. H. Chandler.)

A. On the Pacific Coast for 22 years; San Francisco since 1918.

Q. Are you engaged both in the steamship business and the business of shipping cargoes?

A. Yes, sir.

Q. At the present time is your company the agent of the United American Lines? A. Yes, sir.

Q. When did they start operating?

A. They started operating their intercoastal service in September, 1924.

Q. I understand that they are also engaged in the service from the Pacific Coast of North America to Europe and continental ports? A. Yes, sir. [233]

Q. When did they start that service?

A. I don't know.

Q. You are familiar with the operation of those vessels in that service now, are you? A. Yes, sir.

Q. In general, can you just make a brief statement as to what the practice of those vessels is relative to calling at ports of call?

Mr. GRIFFITHS.—Just a moment before you answer that question, Mr. Chandler. Are you referring, Mr. Graham, to the operation of these vessels now, in the year 1924?

Mr. GRAHAM.—Yes.

Mr. GRIFFITHS.—We object to that as immaterial, irrelevant and incompetent, your Honor, the custom prevailing now will not establish what the custom was prevailing in 1919 or 1920.

Mr. GRAHAM.—I merely want to show, your

(Testimony of C. H. Chandler.)

Honor, that this custom not only prevailed in 1919 and 1920, but has continued down to the present time, without any objection from shippers, and that if there had been any objection the custom would have been discontinued. I am putting Mr. Chandler on the stand out of order.

The COURT.—I will overrule the objection.

A. In our service we operate from a usual range of Pacific Coast ports to a usual range of U. K. and continental ports. It is our practice, in advertising our itinerary, to name the ports of discharge in our advertisement in the rotation of the vessel's call.

Mr. GRAHAM.—Q. In what order do they generally call, or have you any order of call? Is it geographical, or out of the geographical order?

A. Sometimes it is geographical. We don't give that any consideration, we go where the cargo offers.

Q. The geographical order is not given consideration? [234] A. No consideration whatever.

Q. What shipping paper in San Francisco do you advertise in?

A. "The Guide," the "Commercial News."

Q. As to "The Guide," you have just testified that you advertise in "The Guide" the route that the vessel is taking; do you consider that that is notice to shippers as to the route the vessel is going to take? A. Yes, sir.

Q. You rely on "The Guide," do you, as your means of advertising and notice? A. Yes.

Mr. GRIFFITHS.—I object to this as leading.

(Testimony of C. H. Chandler.)

The COURT.—It is leading, but I will allow it.

Mr. GRIFFITHS.—I think he has already answered the question, anyway.

The COURT.—Yes, he has.

Mr. GRAHAM.—Q. I show you here a bill of lading, it has been introduced in evidence in this case, it is a Shipping Board bill of lading, Pacific Form, and has to do with this case and with this ship; are you familiar with the form of bill of lading? Have you used that Pacific Form Shipping Board Bill of Lading? A. Yes, sir.

Q. You have used it? A. Yes, sir.

Q. And you know the terms of it in a general way? A. In a general way.

Q. Will you please read it from where I point, will you read it from here on?

A. "And to touch at any port or ports, in any rotation or order in, or out of, the customary route, and to call at any port or ports more than once, to transship either by rail, lighter or otherwise."

Q. Having read that clause, with which you are familiar and have been familiar in the use of that bill of lading, what is your construction of that clause as the construction of a commercial [235] document by one who has dealt with the bill of lading in the shipping world—what is your construction of that clause as to the right of the ship to make a certain voyage or to go out of her geographical order?

Mr. GRIFFITHS.—I object to the question as immaterial, irrelevant and incompetent, as calling

for the conclusion of the witness, and as calling for the construction by the witness of a provision well recognized in bills of lading, a provision which has been repeatedly interpreted and construed by the courts. Yesterday Mr. Mannon read to your Honor a decision from one of the English courts of highest authority, in which a whole series of these so-called deviation clauses were considered, and the court stated precisely that all of them had been judicially construed.

Mr. GRAHAM.—If your Honor please, the purpose of introducing the testimony of Mr. Chandler at this time is to show the construction of what is to our minds a clause which has heretofore been unconstrued by this Court. As I called to your Honor's attention yesterday on the question of the introduction of parol evidence, this deviation clause is the clause under discussion in this case. In contravention to the cases Mr. Mannon cited yesterday, I cited your Honor to the case of the Savannah Naval Stores, 255 Fed., in which extraneous evidence was introduced; and in that particular case, a clause almost identical with this, the Courts held that there was no deviation. In case there is an ambiguity in a commercial document, which we contend is the case here, we further contend that we have the right to introduce extraneous evidence, as the opinion of shippers, the construction of shippers, people who have actually used this bill of lading, as to what this clause means. The clause is under [236] construction in this court. It has

not been heretofore construed, save and except in the case of the "West Aleta" in New York, which case is now on appeal.

The COURT.—Can you hand him that document and ask him what his construction is of part of it?

Mr. GRAHAM.—I will give him the whole document if your Honor wishes.

The COURT.—Could you do that? Isn't that a question of law for the Court?

Mr. GRAHAM.—I believe that in the construction of a commercial document the interpretation of users of that document is to be considered by the Court. Of course, I appreciate that the final construction of it is for your Honor.

The COURT.—You may ask him what the testimony is relative to a certain matter. It does not seem to me you would have a right, in a court of law, to hand him a writing and ask him for his construction of the document, or any part of it.

Mr. GRAHAM.—In this case, I believe we have already introduced testimony, and testimony has been adduced, to show there was a custom to go in other than the geographical route. Now, in such a case I believe we can go further and show what the contract is; in other words, what the construction of the contract is. The question in this whole case in the construction of this deviation clause.

Scrutton, on page 23 of his work on charter-parties and bills of lading, in speaking of customs, says:

"To this there is an exception that customs of

trade which regulate the performance of the contract, but do not change its essential character, are tacitly incorporated in the contract, though not expressed in it, on the ground that the parties to [237] the contract must be presumed to have contracted with reference to such customs."

And on page 17, on the subject of "Construction of contract," he says:

"The construction of a charter or bill of lading is for the court, unless there is mutual mistake of the parties, ambiguity, or some peculiar meaning attached to the words of the document by reason of the custom of the trade or port to which the document relates."

We believe there is an ambiguity. We have already brought in the custom. We believe further we may introduce testimony to show the construction given to this particular document. Where that document is ambiguous it is for the Court to hear the testimony and decide what the construction of that bill of lading is. It is difficult to see how a Court can construe a document in commercial usage without knowing the construction which has been given to that document by its users. Mr. Chandler testifies he is familiar with it, and has used it, and knows all about it.

The COURT.—And that the provision is usual in these bills of lading?

Mr. GRAHAM.—Not necessarily, your Honor; no. Deviation clauses are not so usual that there can be said to be any established law on what one

(Testimony of C. H. Chandler.)

or another deviation clause is. I cited to your Honor yesterday the case in 255 Fed. which construed the clause to allow a certain deviation. Mr. Mannon cited to your Honor other cases which construed it as not allowing a particular deviation.

The COURT.—I will sustain the objection to this question, but if that provision is one frequently used, you might ask the witness what was the practice under such a provision. Your [238] present question bluntly asks him for a construction of that provision of the document. Objection sustained.

Mr. GRAHAM.—Q. Mr. Chandler, do you know what the custom was of steamship companies operating out of here, and with which you had dealings, acting under this bill of lading, in the deviation clause contained therein as to making ports in any particular order, in or out of geographical order?

Mr. GRIFFITHS.—We object to that question unless it is directed to the custom in the year 1919.

Mr. GRAHAM.—I will limit it to 1919, Mr. Chandler.

Mr. GRIFFITHS.—If he knows what the custom was then.

A. That bill of lading was used by ourselves as managing operators for the Board, and we were also tendered that bill of lading as shippers of cargo to European and other ports, and we raised no objection to that wording. It was our opinion that we were amply protected, and that the vessel had the right to deviate.

(Testimony of C. H. Chandler.)

Mr. GRAHAM.—Q. That is, to go out of her geographical order? A. Yes.

Mr. GRIFFITHS.—Just a moment, Mr. Graham. I object to these questions as leading. He has already answered this question, but I object to the examination as leading.

Mr. GRAHAM.—Q. Were you familiar with the voyage the "West Aleta" took on this particular occasion? A. No, sir.

Q. I call your attention to the fact that the voyage which she took and which it is stipulated in the stipulation of facts, was in this order, the voyage which she intended to take was in this order: Hamburg, Rotterdam and Cardiff, which, if you will recall the geography, is out of the geographical order; had you any experience with shipments, as a shipper and not as a ship [239] operator, with vessels engaged in this European trade at that time? A. Yes.

Q. What would be your idea of your right as a shipper, operating under this bill of lading, on such a shipment as the "West Aleta" made?

Mr. GRIFFITHS.—We object on the ground that it is not competent to ask the witness for his idea of his right as a shipper.

The COURT.—Well, according to the custom prevailing in 1919: That is what he means.

Mr. GRAHAM.—Q. Just answer the question now, with that addition by the judge.

A. We would have raised no question to the ves-

(Testimony of C. H. Chandler.)

sel's itinerary if we had a shipment on there for Cardiff.

Q. In other words, you would consider that the "West Aleta" was acting within the scope of her authority? A. Yes—

Mr. GRIFFITHS.—Just a moment. We object to that question, your Honor, as leading.

The COURT.—I think it is leading, yes.

Mr. GRIFFITHS.—I think you ought to ask the witness to tell the story, Mr. Graham, instead of putting it in his mouth by questions calling for "Yes" or "No" answers.

The COURT.—The objection is sustained and the answer is stricken out.

Mr. GRAHAM.—Q. In the case of the "West Aleta," had you had Cardiff cargo on board, what would you have considered her rights?

Mr. GRIFFITHS.—We object to that as speculative and calling for a hypothetical situation, and as immaterial, irrelevant and incompetent.

The COURT.—What would have been the right of the steamer according to the custom prevailing at that time in the year 1919. [240]

A. We would have considered the steamer had the right to make her advertised ports of call in rotation. If we had had a shipment for Cardiff and the ship was advertised for Hamburg, Rotterdam and Cardiff in succession, and if the shipment was of such nature that it did not require the first port of call discharge we would not have

(Testimony of C. H. Chandler.)

hesitated in tendering the shipment for such an itinerary.

Q. You say you would not have hesitated—was that according to the custom?

A. Yes, that was according to the custom as I understand it.

Mr. GRAHAM.—Q. From the point of view of a shipper? A. Yes.

Q. I show you a copy of "The Guide" of January 5, which was the day before the "West Aleta" sailed, and call your attention to this ad of Williams-Dimond, European Pacific Service, and show you in particular the schedule of the "West Aleta": Hamburg, Rotterdam, and Cardiff, and ask you if, as a shipper, it would have been your custom at that time to have gone to "The Guide" for information relative to the schedule?

A. Yes. That advertisement would convey to me that the ship was going in rotation, Hamburg, Rotterdam and Cardiff, and I would not even have raised the question or have verified it with the operator.

Mr. GRAHAM.—That is all.

Cross-examination.

Mr. GRIFFITHS.—Q. You would have expected her to *have gone Hamburg*, Rotterdam and Cardiff? A. Yes.

Q. Mr. Chandler, the European Line that you are operating now, that is to say, that Sudden & Christenson are operating, is what is called the United American Lines, is it not? A. Yes.

(Testimony of C. H. Chandler.)

Q. And that has been here only for a comparatively recent time, has it not, that European service? A. I do not know. [241]

Q. At any rate, your agency is of a most recent date, isn't it, only very recent?

A. From May 1st, 1924.

Q. That is the time that you took it over?

A. Yes, sir.

Q. You know nothing about that service prior to that time, do you? A. Only in a general way.

Q. You do know that even before your agency it had been very recently here, do you not?

A. I don't know how long it had been here. We were local agents for a year, or for six months prior to the time we took over the general agency, so that I know that it was here during that period.

Q. You advertised, Mr. Chandler, in the "Commercial News" as well as in "The Guide," did I understand you to say? A. Yes, sir.

Q. And your idea is that the shippers are entitled to rely on the advertisements in either paper? A. Yes.

Q. Do you happen to know when that typed form, as I understand you testified it to be, of the Shipping Board bill of lading was drawn, when it came out?

A. To the best of my recollection in May, 1918.

Q. Before the termination of the war?

A. Yes, because I was a party to the drawing up of that bill of lading. I think probably there were some alterations later.

(Testimony of C. H. Chandler.)

Q. What is its designation as to form number, do you know? A. I don't recollect.

Q. I understood you to say on your direct examination that you advertised your itineraries in rotation?

A. Yes, omissions excepted; sometimes we make an error.

Q. Does that mean that if the advertisements are not consistent the shippers are left without information as to where the vessel is going?

A. If we made an error we would correct it in the following issue of "The Guide."

Q. You would not let it stand? A. No. [242]

Q. And that applies also to the "Commercial News"?

A. Our arrangement with the "Commercial News" is to follow "The Guide." We don't pay much attention to that.

Q. You certainly, Mr. Chandler, feel a responsibility to the shippers if you put that advertisement in more that one paper, do you not, to see that the advertisements are correct, for the guidance of your shippers?

A. Yes, we have a certain moral responsibility.

Q. And you would consider it—there is not any question about this, is there, as a responsible operator of the United American Lines, you would consider it is a serious matter if you had advertised that in several places, not to show sufficient concern to see that they correctly represented your

(Testimony of C. H. Chandler.)

itineraries, and if there were any errors they would be corrected immediately?

A. We make that effort.

Q. You would feel that keen sense of responsibility? A. Yes.

Q. Because it follows, does it not, if you feel these advertisements are the guidance to your shippers, that obviously they must be a correct guidance? A. Yes.

Q. There is no question about your feeling on that score?

A. Although we consider "The Guide," as we call it, the shipper's bible, the rest of the advertising is more or less immaterial. "The Guide" is what is followed by the shippers here in San Francisco.

Q. But you do not mean by that—I know something about the way you conduct your business myself—that you would put out advertising elsewhere, and upon the theory that it was not the most important guide, simply allow it to lapse into error. You would follow it and check it, wouldn't you?

A. We have been guilty of that. [243]

Q. You have been guilty of that? A. Yes.

Q. But you consider it a guilt?

A. Yes. We have advertisements in monthly publications, etc., and really forget about them.

Q. But that is a lapse and a guilt; there is no question about that, is there?

(Testimony of C. H. Chandler.)

A. I think so, yes. I think there is a certain moral responsibility there.

Q. The United American Line vessels touch the northern ports, too, don't they, that is, Seattle, and they have been putting into Vancouver for grain, and all that sort of thing? A. Yes, sir.

Q. And I suppose you have similarly advertised up there? A. Yes.

Q. And what you so aptly put as your sense of moral responsibility would, of course, govern there, as elsewhere, that is, you endeavor to keep that standard up everywhere throughout this service, do you not? A. Yes, certainly.

Mr. GRIFFITHS.—I think that is all.

Redirect Examination.

Mr. GRAHAM.—In line with the testimony of Mr. Chandler, reference to ports of call, and just to show the contributing service of these vessels in the United American Line, I would like to have him read his ad to-day, just to show how they are continuing to rely on "The Guide" to publish the service, and how it doesn't run true to ports of call for every vessel, but runs to intermittent ports for various vessels; in other words, each vessel is not scheduled to go to London, Liverpool, Hamburg, it may be Bremen, it may be Hamburg, or even Bordeaux, I suppose, and that the advertisement shows that in each individual case.

Mr. GRIFFITHS.—In other words, that he expects to run according to his ads.

(Testimony of C. H. Chandler.)

Mr. GRAHAM.—Yes. We introduce this in evidence. [244]

Mr. GRIFFITHS.—We object to it, your Honor, as immaterial, irrelevant and incompetent.

The COURT.—This is what is being done now, do you say?

Mr. GRAHAM.—Your Honor has already allowed the witness to testify as to how their custom has continued up to the present time.

The COURT.—Very well.

Mr. GRAHAM.—I introduce in evidence a copy of "The Guide" dated December 29, 1924, and ask to have the same marked Respondent's Exhibit "D."

(The document was marked Respondent's Exhibit "D.")

Q. Just by way of calling to your attention what your ad does carry here, Mr. Chandler, would you mind reading to the Court the vessels and their notations as to route?

A. Steamer "Hessen," Hamburg, London, Hull, Antwerp.

Q. Is that in geographical order, or out of geographical order?

A. Out of geographical order. The steamer "Osaris": Liverpool, Hamburg, Antwerp.

Q. How is that with respect to geographical order?

A. That is out of geographical order. The steamer "Riol": Hamburg, Bremen, Antwerp.

(Testimony of C. H. Chandler.)

Q. How is that with respect to geographical order?

A. I would say that was out of geographical order. The steamship "Holger": Hamburg, London, Antwerp.

Q. How is that with respect to geographical order? A. That is out of geographical order.

Q. Have you named all the vessels sailing from here?

A. The "Sachsen": Hamburg, London, Hull, Antwerp. That is not in geographical order. The steamer "Isis": Hamburg, Antwerp; the same thing applies to that. The steamer "Montpelier": Liverpool, [245] Hamburg: That is geographical. The steamer "Kermit": Hamburg, London, Antwerp; that is out of geographical order.

Q. Is your intercoastal service covered in the same ad? A. Yes.

Q. Just state to the Court very briefly your manner of operating in the intercoastal service; I just want to show by this that in another service, your Honor, they operate out of geographical order.

Mr. GRIFFITHS.—It does not seem to me you can prove custom in that manner. By intercoastal service you mean, I presume, the service through the Canal, from here to New York. Your Honor is familiar with that by personal experience. I don't believe you can prove European custom by any intercoastal custom.

Mr. GRAHAM.—I think we will be able to show

(Testimony of C. H. Chandler.)

your Honor that it is not only the custom in the European service to call at ports from the Pacific Coast to Europe out of their geographical order, but I believe we will be able to show it was the custom to call at ports all around the world, across the Pacific, and in the intercoastal service, in the freight business. It must be distinctly understood that passenger service has nothing to do with this case. Passenger vessels are confined to ports of call in geographical order. I want to show your Honor the continual practice up to the present time, in order to show the general custom of going out of the geographical order.

The COURT.—I will overrule the objection.

A. We give no recognition whatever to ports of discharge in geographical order.

Mr. GRAHAM.—Q. Just in general, Mr. Chandler, will you name a couple of ports—

The COURT.—I think that answers the question sufficiently, Mr. Graham.

Mr. GRAHAM.—It answers it sufficiently to suit me, yes, [246] your Honor.

Q. You testified as to "The Guide" and the "Daily Commercial News"; do you consider the "Daily Commercial News" in the same light you do as the other daily papers?

The COURT—He has already covered that.

Mr. GRAHAM.—Q. Who handles the advertisements in Seattle for you—does your office here in San Francisco handle them, or are they handled by the office up in the North?

(Testimony of C. H. Chandler.)

A. Our office in the North.

Q. You testified you were a member of the committee which drafted this bill of lading, or one substantially like this one which you have now seen; what was that committee?

A. I think you misunderstood me, I was not a member of the committee. The United States Shipping Board in San Francisco caused that lading to be printed. The lading was drafted, and we proof read it and caused it to be printed—also the contract.

Q. Did you make comments on it, if there were any to be made? A. Typographical errors.

Q. Do you know what class of men composed that committee; that is, were they shippers, or what were they? A. I don't know.

Recross-examination.

Mr. GRIFFITHS.—Q. You adopted that clause, Mr. Chandler, so far as you had anything to do with its adoption, because you knew it to be a well-recognized and well-construed clause in bills of lading, did you not?

Mr. GRAHAM.—I object to that, your Honor, unless Mr. Griffiths confines himself to what is a well-construed and well-recognized clause.

Mr. GRIFFITHS.—I am leaving that for him to say. He has followed standard customs interpreted by the courts—

The COURT.—I will overrule the objection. [247]

(Testimony of C. H. Chandler.)

A. To be perfectly frank with you, I never gave any consideration or thought to that clause.

Mr. GRIFFITHS.—Q. So you don't know how that clause is construed or interpreted, though you do know what your custom is when operating under it; that is about all it comes to, isn't it?

A. Yes, sir.

Q. Now, if I get you correctly, your thought is that when you advertise a ship to go to a certain port, you are not bound by geographical order anywhere, so long as you reach that port, the way in which you go is absolutely within the ship owner's discretion?

A. We follow a common practice.

Q. That is what I am getting at. If you put a ship on the berth, here, and solicited my cargo to go to Honolulu, would you feel that you could go around through the Canal and work your way around the Canal and eventually discharge my cargo at Honolulu?

A. Well, I would feel that I would never get any more of it if I did that.

Q. You certainly would not. I am putting it in an extreme way, Mr. Chandler, because I think we are at one on the matter. What you mean when you say you can go in any geographical order is, any geographical order within the voyage contracted for; that is what it comes down to, isn't it? A. Yes.

Mr. GRAHAM.—You say within the voyage contracted for; you mean within a certain range?

(Testimony of C. H. Chandler.)

Mr. GRIFFITHS.—I object to that as leading.

The COURT.—Don't lead him.

Mr. GRAHAM.—Q. Do you know whether—

Mr. GRIFFITHS.—Ask him what he means.

Mr. GRAHAM.—Q. What do you mean by the voyage contracted for?

A. The voyage contracted, the voyage advertised. As I [248] say, we are operating vessels from a usual range of ports to a usual range of ports; we have scheduled the vessel's discharging ports in rotation to suit the cargo's requirements with usual, fair operating judgment. It would be poor operation to run a ship around Africa to get to the Philippine Islands, or something like that.

Q. So what you mean by your contract voyage is what you have just said, your advertised voyage? A. Yes.

Q. Are you familiar with the use of the word "via" in bills of lading; when is that used, if it is used at all? What would that indicate to your mind?

A. We might use it in connection with a transshipping point.

Mr. GRIFFITHS.—Q. Do you mean, Mr. Chandler, that the advertised voyage is the contracted voyage, and that the advertisement constitutes the contract? A. No, sir.

Q. Then I misunderstood you. What is the contracted voyage?

A. The contracted voyage—will you tell me what you mean by that, the contracted voyage?

(Testimony of C. H. Chandler.)

Q. Let me approach it this way: You stated you determined the ports to which you were going to send your ships by your cargo offerings.

A. Yes.

Q. That is the way you line the thing up; now, having so determined it, you consider that you are under obligations to your shippers to go to the ports so determined?

A. Under a moral obligation.

Q. Under no legal obligation? A. No.

Q. Are you under any legal obligation as between you and your shipper as to where you are going to go before you ultimately reach the port where the cargo is going to be discharged?

A. It is my opinion we are not. [249]

Q. Under no legal obligation whatever?

A. No.

Q. So that it comes to this, then, does it not, that as far as any contract, agreement or obligation with your shipper is concerned, you can get that ship to the port of discharge of the cargo by any route whatsoever over the face of the globe that you desire, though as a practical proposition, for your own convenience, you would not go out of the way too far? A. No.

Q. But as far as your legal rights are concerned, you can just simply do anything you please, so long as you get there?

A. Yes. In the competitive trade, though, we would feel a moral obligation in the event a deviation caused the shipper additional insurance, we would feel that we should pay the differential.

(Testimony of C. H. Chandler.)

Q. You recognize, then, that when you go out of the line that you have determined to send your ship upon, and agreed with your shipper to send your ship upon, that there is a deviation; you recognize the deviation, don't you?

A. I don't exactly get you.

Q. You used the word "deviation," and I am wondering what "deviation" is; if you can go around the world anywhere you please with a ship, unless you mean deviation in a purely moral sense; is that what you mean?

A. Could I illustrate?

Q. I would rather have you answer my question, and then illustrate it, if you don't mind. I simply want to get your position here, Mr. Chandler. It may be that you and I won't exactly agree upon the thing, but I would like to know what your position is.

A. I can illustrate it better than I could answer it in any other way.

The COURT.—Well, supposing you do that.

A. (Continuing.) For instance, we will take a case which we had. We had a ship advertised for Boston, St. Johns, New Brunswick, Baltimore. If we had followed that itinerary in accordance with [250] the advertisement, we would have considered it no deviation—

Mr. GRIFFITHS.—Q. First you had to go to Boston, then St. Johns, and then Baltimore?

A. Yes. After we had our Boston cargo on board, we decided we would go to St. Johns first,

(Testimony of C. H. Chandler.)

then Boston, and then Baltimore. We considered that a deviation, so did the Underwriters.

Q. Supposing, having advertised this run, Boston, St. Johns, and then back to Baltimore, you had run out to the Bermudas and in for some purpose, would that have been a deviation?

A. It would depend on the necessity for us going to the Bermudas. I would say it would be a deviation if we decided to take on cargo for the Bermudas after we had advertised our itinerary, I would say it would be very much of a deviation.

Q. Supposing you had originally advertised and told the shippers you were going to take some cargo to Boston, and then afterwards you ran your ship to St. Johns and Baltimore, would that be a deviation? A. Yes.

Q. So that once you tell a shipper you are going to a certain port and he has given you cargo for that port—

A. And he has taken out insurance accordingly.

Q. (Continuing.) —and if after that you would put any other ports on your list, you would deviate, and you would so consider it, wouldn't you?

A. In the event that the shipper was penalized on account of insurance.

Q. Is it your idea it depends on whether he suffers any penalty, or not?

A. As far as our attention would be called to it.

Q. These deviations that you are referring to now, are those, in your judgment, legal or moral deviations?

A. The opinions that have been handed down to

(Testimony of C. H. Chandler.)

us by Underwriters would indicate to us that they were very likely legal. [251]

Q. You know from some opinions you have received, probably, that it is rather a serious thing to deviate, do you not?

A. We are inviting trouble.

Q. You are inviting trouble because you know that while perhaps as a ship owner you regret the law to be such as it is, you know that the deviation may be fraught with legal consequences, don't you?

A. I would not say that, because I really don't know the law, but we would feel that if we had accepted cargo to a port of call and intimated to the shipper or advertised to the shipper we would make that port of call, and then without giving him a chance to protect himself on the insurance deliberately changed our route and the vessel got in trouble we would probably be inviting a lot of trouble from the cargo's underwriter.

Q. And you are inviting trouble for your shippers if you have advertisements that are not in accord, too, aren't you?

A. Yes, from a traffic standpoint.

Q. And that, of course, explains the feeling of moral responsibility that you referred to a while ago? A. Yes, sir.

Q. You want to have those advertisements in accord; that is true, isn't it, Mr. Chandler?

A. Yes, sir.

Q. There is this further question I would like to ask you, Mr. Chandler; Mr. Ghaham handed up

(Testimony of C. H. Chandler.)

to you this bill of lading and this so-called deviation clause; you told me, and I think I quite well understood, that when you said the ship might go in any order, you meant within the voyage agreed for; you appreciated, did you not, Mr. Chandler, that this deviation clause that you were reading does not provide for any sailing out of the order beyond the voyage agreed for?

A. No, I did not appreciate that.

Q. You did not appreciate that?

A. No. [252]

Q. Do you appreciate that there are—

A. I will after the decision in this case, maybe.

Q. Do you appreciate that there are some deviation clauses which do provide for sailing in any order, whether within or beyond the voyage agreed for, whereas as others give that so-called privilege to the ship only within the agreed voyage? I am asking you whether you do appreciate those two types?

A. I don't think I do.

Q. My associate, Mr. Mannon, suggests to me that you referred in your last answer to a decision of the court; you appreciate, as a shipping man, that for information and posting as to what your rights are under this so-called clause of the bill of lading, you go to the courts, don't you? A. Yes.

Q. You cannot interpret that in your own manner?

A. I might state that in this instance we could hardly feel that the interpretation could be otherwise than we have put on it, otherwise we would not

(Testimony of C. H. Chandler.)

be in business, it would be impossible to be in business.

Q. But if the interpretation is otherwise, Mr. Chandler, you recognize that as the construction, don't you?

A. We would have to adhere to it.

Q. And I think you would stay in business, too, Mr. Chandler.

A. Well, it would be impossible, in our intercoastal trade, to stay in business.

Mr. GRAHAM.—Q. Mr. Griffiths has called your attention to this clause: "To touch at any port or ports in any rotation or order in, or out of, the customary route, and to call at any port or ports more than once." What do you consider "out of the customary route"?

Mr. GRIFFITHS.—I shall have to object to that again, your Honor, and particularly now, upon the ground that the witness has [253] stated he is unfamiliar with the different types of deviation clauses; this clause that you have just read to him is one that has been judicially construed in the cases. It has been recognized for over 100 years. If this line were to be followed, you could take a witness over every one of the clauses in a bill of lading, and no one would know where they were. Every shipping man would like a greater liberality in these matters, of course.

Mr. GRAHAM.—I have already called your Honor's attention to the fact that there is a divergence in the decisions on this very question.

The COURT.—I will sustain the objection.

(Testimony of Fred A. Hooper.)

Mr. GRAHAM.—Q. You spoke about the consideration that your underwriters gave to the question of deviation in the particular case you cited: Who were the underwriters?

Mr. GRIFFITHS.—I object to that as immaterial, irrelevant and incompetent.

The COURT.—Objection sustained.

Mr. GRIFFITHS.—That is all.

Mr. GRAHAM.—That is all.

Mr. GRAHAM.—Your Honor, I have some witnesses here; we will not be able to reach them now until two o'clock; will your Honor give an order to the witnesses to return at two o'clock?

Mr. MANNON.—We ask to have the witnesses excluded from the courtroom, your Honor. It is evident that the same line of testimony is going to be followed, and we would like to have an order that the witnesses be excluded under the rule. Also, we would like to have Mr. Hooper's testimony concluded before any other witness is called.

The COURT.—Very well. The witnesses will return at two [254] o'clock. We will be in recess until two o'clock.

(A recess was here taken until two o'clock P. M.) [255]

AFTERNOON SESSION.

TESTIMONY OF FRED A. HOOPER (RECALLED—REDIRECT EXAMINATION.)

FRED A. HOOPER, redirect examination.

Mr. GRAHAM.—Q. Mr. Hooper, to go back to the question of the advertising of these various

(Testimony of Fred A. Hooper.)

vessels, and particularly the "West Aleta," what would you do if your cargo booked for a particular port other than that advertised and decided to take on a new port, to go to that new port, what would you do?

Mr. MANNON.—If your Honor please, may it be understood that we have already objected to these questions, and in addition to the grounds already specified, that they are immaterial, irrelevant and incompetent, that they are not the proper subject of expert evidence?

The COURT.—I have said that subject to objection, I would permit testimony as to custom to be introduced. You may introduce evidence as to custom. You are asking the witness on the stand now what he would do. I do not think under any rule of evidence such testimony as that is admissible. You might ask him what would be done under the general custom prevailing here.

Mr. GRAHAM.—You have heard the Judge's remarks, Mr. Hooper. What would be done under the general custom in the situation such as I have outlined it to you?

A. Our general custom was, if we ever indicated a vessel for a new port after we had commenced to receive cargo for her original ports, our custom was that we would immediately—

The COURT.—Not what you would do, but what the custom was.

A. The custom was to immediately notify the shippers, either verbally or by circular letter, of the fact that an additional port has been added, and they

(Testimony of Fred A. Hooper.)

have an opportunity of either to cancel their bookings, or to object, and to give us an opportunity [256] and them also, to make other disposition of the cargo. That is as far as I can say as to the custom.

Mr. GRAHAM.—Q. Was it customary to advertise the route a vessel was going to take for more than, say, about a month's time ahead?

Mr. MANNON.—I don't like to object to leading questions, your Honor, but I don't think they should be asked this witness.

The COURT.—I will permit this question, but refrain from asking leading questions, Mr. Graham.

Mr. GRAHAM.—Very well, your Honor.

A. Ships sometimes were advertised only ten days before sailing; sometimes a week; sometimes they were not advertised at all. A ship would come on a berth very promptly, and we did not have an opportunity to give our information by advertising, and we would have to circularize. Sometimes ships were advertised a month in advance. At the present time we advertise our ships, and all other lines advertise their ships, as far in advance as possible; it is business to do so.

Q. Take this particular voyage of the "West Aleta," what is your opinion as to the question of proper seaworthy stowage for the entire voyage, stowed in the manner in which it was?

A. The fact that Captain Rinder, marine surveyor, gave the vessel a certificate, seems to be sufficient evidence that she was properly loaded, and in a seaworthy condition.

(Testimony of Fred A. Hooper.)

Q. Going back to the question of payment for these ads, do you know now who paid for the ads in the "Daily Commercial News" and in "The Guide"?

The COURT.—He answered that question this morning, I think. If I remember correctly, he said sometimes he did and sometimes someone else in the office, but that all of the bills went over [257] his desk.

A. They usually went over my desk for O. K., or through my department.

Mr. GRAHAM.—Q. The information I would like is whether your company paid for it, or some other company paid for it, or some other organization; where did the money come from?

A. As nearly as I can remember, Williams-Dimond did pay for the advertisements, but whether the amounts were charged against the ship as ship disbursements, or not, I cannot at this time say. Williams-Dimond passed the checks in payment. What further charge was made after that, or what bookkeeping went on after that, I cannot say at this time.

Q. That is, you don't know what account those checks were paid out of? A. No.

Q. Why do you remember the case of the "West Aleta," or the sailing of the "West Aleta," and its loading, and its subsequent events, any more particularly than the "West Cayote" or any other of these Shipping Board vessels?

Mr. MANNON.—I object to that as immaterial,

(Testimony of Fred A. Hooper.)

and calling for the conclusion of the witness, and it is not proper redirect examination.

Mr. GRAHAM.—The witness was asked this morning why he failed to remember certain events of certain other ships—

The COURT.—I will allow the question, but it seems to me the answer is almost obvious. I will permit the question to be answered.

A. In this particular case it is owing to the fact that she had a most unusual and exceptional cargo of wine, and the fact that it was shipped out of the country at the particular time and under the conditions under which it was shipped out of the country; furthermore, having quite extended photographs of the vessel [258] in my desk at all times, the "West Aleta" case has been discussed by me a great many times since the affair, and consequently that particular ship remained very keen in my memory.

Mr. GRAHAM.—Q. Will you explain to the Court what you mean by the term "60 to 70 feet to the ton"?

A. That means the relative measurement to weight per short ton. In other words, 2,000 pounds of cargo of the kind referred to this morning would average a measurement of 60 to 70 cubic feet. A ton on the Pacific Coast, in Pacific Coast shipping, as a general custom, is always considered 2,000 pounds, whereas a ton in practically any other port in the world, with the exception of our domestic ports in the intercoastal trade, is usually referred

(Testimony of Fred A. Hooper.)

to or thought of in tons of 2,240 pounds, the long ton. When you speak of measurement per ton here I always have reference to the custom on the Pacific, which has reference to 2,000 pounds to the ton.

Q. Do you know when these bills of lading with which these various shipments were concerned were signed?

A. They were signed always after complete delivery of the cargo at the dock or to the ship, which usually was not more than 10 days to 2 weeks before the sailing of the ship. That is the usual practice.

Q. What relation would that time bear to any time when you had any other writings, letters, options, or bookings?

A. I don't just understand your question.

Q. What relation would the time of the signing of the bills of lading have to the time of the writing of various other letters, or options, etc.?

A. The signing of the bill of lading is the consummation of your contract. Whatever might have transpired, either by letter or conversation, or anything previous to that time, would be immaterial after your bill of lading contract, or after the actual issuance of your bill of lading. You are [259] absolutely obligated then.

Q. The letter which Mr. Mannon showed you this morning from the California Wine Association relative to the booking of that cargo, what did you consider that as, what was that?

(Testimony of Fred A. Hooper.)

A. Confirmation of space engagement, and confirmation of rate, confirmation of our intention to lift that particular parcel of cargo on that particular vessel. It is simply a confirmation of verbal conversations.

Q. I would like to have you describe very briefly the connection between the old European-Pacific Service of Williams-Dimond and the service which you heard described this morning by Mr. Chandler, so that the Court can understand the testimony of Mr. Chandler more clearly.

Mr. MANNON.—I think I will object to that as immaterial. The testimony of Mr. Chandler will have to stand by itself, I take it.

The COURT.—I will overrule the objection.

A. The European-Pacific Line was started with Shipping Board vessels, by Williams, Dimond & Co. as managing operators for the Shipping Board. After that service had been in operation for some time, the American-Hawaiian Steamship Company, whom Williams, Dimond & Co. represented as general agents on the Pacific Coast here since 1900, commenced to have their steamers returned by the Government; in the meantime the United American Lines, through stock manipulation, gained stock control of the American-Hawaiian Steamship Co., and became operating managers for the American-Hawaiian Steamship Co. in the European trade, Williams, Dimond & Co. continuing the Pacific Coast representation. Then, as the American-Hawaiian steamers were being gradually returned

(Testimony of Fred A. Hooper.)

by the Government, we, in turn, commenced to release Shipping Board steamers, supplanting them with steamers [260] of the American-Hawaiian Steamship Co., under the managing direction of the United American Lines. That method of operation and management continued until we had—let me see, it was about last May when the United American Lines and the American-Hawaiian Steamship Co. became divorced. The United American Lines then immediately started their own organization and their own agencies by appointing Sudden & Christenson as agent in San Francisco, and Sudden & Christenson automatically—we stepped out one night at 5 o'clock and Sudden & Christenson stepped in the next morning at 9 o'clock, taking over the operation of the United American ships in the European trade from us, that is, Williams, Dimond & Co. Then Williams, Dimond & Co. immediately resumed the operation of the American-Hawaiian ships in the intercoastal trade, and the American-Hawaiian ships were withdrawn from operation in the European trade, the United American Line then resuming the trade with old Cosmos Line ships, and old German ships, and some of their own American ships. That is the connecting link between the United American Lines operations as of to-day and when they started in the European business. It was simply a continuous operation with an overnight transfer of authority.

Mr. GRAHAM.—That is all.

(Testimony of Fred A. Hooper.)

Recross-examination.

Mr. MANNON.—Q. Sometimes, as I understand your testimony this afternoon, your ships were not advertised at all as to ports of destination, occasionally they were advertised for the period of ten days, sometimes for a longer period, during the time you were operating the line in question here, the European-Pacific Line, before the "West Aleta" went out: Is that right? A. Yes, sir. [261]

Q. With regard to the time the bills of lading are usually executed, do I understand you to say that the bills of lading are the last signed, the last document signed? A. No, I didn't say that.

Q. What is the last document signed?

A. The last document signed for what operation or covering what transaction?

Q. For the shipment of cargo on the vessel that you were operating for Williams-Dimond.

A. You mean the last document that is signed between the company and the shipper, or the entire transaction in clearing a ship?

Q. I mean the last document signed as between the company and the shipper.

A. The bill of lading is supposed to be the last document signed.

Q. Now, with regard to the matter of firm bookings, firm space engagements, is it not a fact that while you were operating the European-Pacific Line and prior to the time the "West Aleta" sailed, that it was common practice for you to have a firm space engagement on your ships by certain shippers which

(Testimony of Fred A. Hooper.)

constituted, in your opinion and theirs, a contract for space? A. Yes, sir.

Q. And as you knew at that time, it was the practice then of those people who had made the firm space engagements, to sell their goods with reference to the fact that they had that space engaged to ship the goods? A. Not always; no, sir.

Q. Not always, but sometimes?

A. Sometimes, but not always.

Q. And it was common practice then, when people were intending to ship goods, for them to make a space engagement a considerable length of time ahead, so as to have the goods ready to send?

A. Not always.

Q. No, not always, but sometimes?

A. Sometimes, but not always.

Q. And it appears here, that the California Wine Association [262] had engaged its space as early as November 25, 1919, perhaps a month before it was intended to have the ship sail, did they not?

A. From the correspondence passed I would judge so; yes.

Q. That is the common practice in shipping, is it not, then and now?

A. It is common practice to make reservations in advance of the sailing of a steamer—very common.

Q. And those reservations would be firm reservations, that is, would constitute a contract for space?

A. They are not always firm. In a great majority of instances, the reservations carry an option

(Testimony of Fred A. Hooper.)

with them; in other words, a shipper may be in cable communication on a 500-ton shipment of rice, or beans, or flour, and he will make an optional reservation, in other words, he will take a reservation out the option on which is to expire in 48 hours, or in 60 hours.

Q. But at some time or other that option is exercised and becomes a firm booking?

A. Not always; it is not an infrequent case to have your options cancelled.

Q. Well, a man either cancels his option or it is understood that he exercises the option, and if he does he then has a firm booking, has he not.

A. Yes, sir.

Q. And that is the usual course of space engagement for the forwarding of goods on vessels like the "West Aleta," and other vessels of its kind?

A. It is the usual practice.

Q. And this letter of November 25, 1919, introduced in evidence here from you to the California Wine Association, was to confirm space, to make a firm contract, was it not? A. Yes.

Q. Before Sudden & Christenson took over the agency of the United American Lines, Mr. D. W. Burchard had charge of the San Francisco office of the United American Lines, did he not?

A. Mr. Burchard was what might be termed a Pacific Coast Manager, but Sudden & Christenson were the business getters and the [263] parties who did the actual business with the public. Mr. Burchard was in an official capacity.

(Testimony of Fred A. Hooper.)

Q. Through whom were the charters arranged, if you know? A. What charters?

Q. Space engagements of any character.

A. Through Sudden & Christenson, and also through Mr. Burchard.

Q. As a matter of fact, before Mr. Burchard was finally eliminated, were not the contracts for space arranged by and signed by D. W. Burchard?

A. Sometimes they were. I cannot testify definitely as to their technical detail method of operation down there.

Q. Were not Sudden & Christenson acting in Seattle at that time while Mr. Burchard was acting here for the United American Lines?

A. The United American Lines had, as I understand, their organization—this evidence that I am giving you now, and the remarks I am making to you now, are simple hearsay from me, I don't know it of my own knowledge.

Q. And that is true with regard to all of this explanation you have been giving, isn't it?

A. No, sir, it is not true so far as the United American Lines and the American-Hawaiian, and the Williams-Dimond connections are concerned.

Q. What you know is in regard to the Williams-Dimond connection and your own personal connection, isn't it?

A. And the American-Hawaiian connection with the United American, and the causes which brought about the divorce between the United American and

(Testimony of Fred A. Hooper.)

the American-Hawaiian, that is all of my own personal knowledge.

Q. But you have no knowledge of the relations between Mr. D. W. Burchard and Sudden & Christenson with the United American Lines?

A. Only what everybody else knows as a matter of public information.

Q. And that is the reason you are testifying to it, isn't it, [264] Mr. Hooper, because it is a matter of public information? You don't know anything about it, yourself, do you?

A. As regards their technical business organization, and details, I have no personal knowledge of that, and I do not believe I attempted to say anything in connection with that.

Mr. MANNON.—That is all.

TESTIMONY OF JAMES J. RUDDEN, FOR RESPONDENT.

JAMES J. RUDDEN, called for respondent, sworn.

Mr. GRAHAM.—Q. What is your business?

A. Marine surveyor.

Q. With whom are you now associated?

A. Myself.

Q. With whom were you associated in 1919 and 1920? A. With Captain J. H. Rinder, deceased.

Q. Did you have any connection with the steamship "West Aleta"?

A. I was aboard of her when she was loaded here in San Francisco and also at Point San Pablo.

(Testimony of James J. Rudden.)

Q. Did you have any connection with loading her?

A. When Captain Rinder was not there I went up and represented him to see that she was stowed properly.

Mr. MANNON.—Counsel produces a surveyor's certificate, and says it is Captain Rinder's certificate. We will accept his statement for it. It may go in evidence, but we think that it is immaterial.

Mr. GRAHAM.—We introduce survey certificate dated January 6, 1920, of the steamship "West Aleta," with the following cargo destined for Hamburg, Rotterdam and Cardiff, via the Panama Canal; it is signed by John H. Rinder, surveyor. We ask that it be marked Respondent's Exhibit "E."

The COURT.—You say there is no objection to it?

Mr. MANNON.—We think it is immaterial. Counsel has identified it, and that is satisfactory to us. [265]

Mr. GRAHAM.—Q. This is the surveyor's certificate, is it? A. Yes, that is it.

Q. What connection did you have with Captain Rinder in the survey of that vessel?

A. I was assistant to him.

Q. Did you work along with him?

A. I worked with him, and also without him.

Mr. GRAHAM.—I introduce in evidence the stowage plan of the steamship "West Aleta," sailing January 6, 1920, and ask that it be marked Respondent's Exhibit "F."

(Testimony of James J. Rudden.)

Q. I show you a stowage plan of the vessel and ask you if that is, in fact, the stowage plan?

A. That is the stowage plan.

Q. I wish you would take a good look at that and note the stowage of the wine on that vessel. In your opinion as an assistant surveyor of that vessel, would it have been proper stowage to have stowed as much cargo of wine as is stowed as indicated there, in any other place? A. No, sir.

Q. Would it have been possible to have unloaded the Cardiff wine first, as it is stowed in that vessel?

A. It could by extra expense and shifting of cargo.

Q. What would they have had to have done to have unloaded Cardiff first?

A. You would have to take out the square of the hatch and the 'tween decks.

Q. What is in the square of the hatches and the 'tween decks?

A. Barrels of brandy, lumber, rice.

Q. Cargo destined for what port?

A. Cargo destined for Hamburg. Hamburg No. 1. Rotterdam and Hamburg in No. 2. Also Hamburg in No. 3. And Hamburg in No. 4.

Q. You will note here a stowage of cargo which is noted as Rotterdam bean oil; tell the Court where that is stowed?

A. That is stowed in No. 3 hatch, in the 'tween-decks. [266]

Q. Give the Court your opinion as to the propriety or impropriety of that stowage?

(Testimony of James J. Rudden.)

A. The stowage is all right, only to guard against heat there in that hatch.

Q. But as to the possibility of leakage on any other cargo.

A. There is none, whatsoever, there.

Q. Now, the same thing as to the Rotterdam brandy, where is that stowed?

A. We will call that No. 4—Yes, in the forward end of No. 4 'tween-decks.

Q. Stowed over what cargo?

A. Stowed over lumber.

Q. What about that as to being good stowage or bad stowage?

A. The holds were inspected before that was loaded in there, and the scuppers were found clear, and if there was any leakage it would run from the scuppers to the bilges.

Q. Could the scuppers have taken care of all the leaks there, if there had been any? A. Yes.

Q. How about this cargo here, Cardiff wine; would the same answer apply to that?

A. As long as there was sufficient dunnage underneath it would not hurt the cargo.

Q. Now, taking you back to the after end of the ship, in your opinion what was the purpose of stowing rice for Hamburg and Rotterdam where it is shown to have been stowed?

A. I presume it is the way the ship was going to go in ports by order.

Mr. MANNON.—I move to strike that out; the witness says he presumes.

(Testimony of James J. Rudden.)

Mr. GRAHAM.—Q. Do you know why it was stowed there?

A. It was stowed there so that it would be first out.

Q. If the Cardiff wine had been loaded in the inverse order, that is, on top, to have allowed discharge first, what would have been the effect on the issuance of a surveyor's certificate?

A. That would be murder, to put wine on top of general merchandise [267] —rice and other stuff that was in the ship.

Q. Would you or would you not have issued a surveyor's certificate? A. No, sir.

Mr. GRAHAM.—That is all.

Cross-examination.

Mr. MANNON.—Q. The Hamburg rice was stowed in the most available place, so that the Hamburg rice could be taken out first, as I understand your testimony: Is that right?

A. By shifting cargo, yes.

Q. I mean the Hamburg rice.

A. It depends on what hatch it is in. In No. 5 you have rice in the after end. That is the fact, isn't it?

Q. The way the ship was stowed, it was arranged, was it not, so the Hamburg rice would be taken off first?

A. If that was her first port of call to go to, yes.

Q. You know the way she was stowed, don't you?

A. I do, yes.

(Testimony of James J. Rudden.)

Q. So it was arranged, was it not, so that that rice could be taken off first? A. Yes.

Q. You are sure of that, aren't you? A. Yes.

Q. And the same thing is true of the Rotterdam rice, the Rotterdam rice was placed so it could be taken off before the Hamburg rice?

A. May I have the stowage plan in front of me while you are asking me these questions?

Q. Certainly. Now, will you answer my question? A. It could not, without shifting cargo.

Q. What I am getting at is this: If you put the Rotterdam rice in the most convenient place, you could have taken that off first, could you not, at Rotterdam?

A. If it was stowed here to be taken out first, yes.

Q. You could have stowed it in that way had you been so directed, [268] or so minded?

A. Yes, if I told the stevedores. That was up to the office, though, I have nothing to do with that.

Q. You have nothing to do with that? A. No.

Q. But it could have been done. It is all rice. Calling it Hamburg rice or calling it Rotterdam rice has nothing to do with making it easier or harder to stow.

A. It is all rice, but you have your destination separate, and the same time look out for the stowage and seeing it is not damaged by the other cargo.

Q. A surveyor who was interested in getting off certain rice at Rotterdam and in getting off certain rice at Hamburg, could have stowed it to get it off that way, couldn't he?

(Testimony of James J. Rudden.)

A. The surveyor has nothing to do with that, at all.

Q. I thought you had directions—

A. All we supervise is to see that the ship is properly loaded and seaworthy.

Q. Who does determine those things on the ship?

A. The office; the first officer of the vessel.

Q. The officers of the ship could have stowed the ship so that the Rotterdam rice could come off first?

A. The office people and the ship's officers—by the ship's officers I mean the captain.

Q. They could have done that without any difficulty at all, couldn't they? A. I presume so.

Q. You are sure of it, aren't you?

A. Not if you have a full ship. It all depends on how much cargo you have in the ship for the different places.

Q. I don't know much about this, and you know a great deal about it. If you have two sacks of rice and one is going to Rotterdam and one to Hamburg, and they are just exactly alike, if you are going to Hamburg first you put the Hamburg sack of [269] rice so that you will take it off at Hamburg, don't you? A. Yes.

Q. And you put the Rotterdam sack of rice in such a place or in such a position so that you can take that sack off at Rotterdam? A. Yes.

Q. So there is no trouble in regard to loading that rice, either as to Hamburg or as to Rotterdam, is there, had it been stowed with that end in view

(Testimony of James J. Rudden.)

originally? You haven't any question about that, have you?

A. It all depends on how much cargo comes down, whether you have it all rice, or all wine, or all dried fruits. The chances are the stuff may not come down until the last minute, and then you have to leave space in the 'tween-decks, you have to keep weight in the lower hold for the stability of the vessel.

Q. So you cannot always load a vessel in regard to the ports of call, can you, but you have to load it in the way the cargo comes down?

A. Absolutely.

Q. And this one was loaded that way?

A. I don't know about that. This one was loaded in regard to the ports of call.

Q. Then the explanation you gave has nothing to do with this matter, has it?

A. You have to leave space for it; sometimes you have to knock off your gangs of stevedores and you have to wait for it.

Q. But if you have two sacks of rice, one for Rotterdam and one for Hamburg, you would put the one on top which is going to be taken off first, wouldn't you? A. Yes.

Q. You are perfectly clear on that, aren't you?

A. Yes.

Q. Would you be competent, for instance, with that ship stowed as she was and laden as she was, if you were at Cardiff, to take the Cardiff wine off first?

(Testimony of James J. Rudden.)

A. You say to take the Cardiff [270] wine off first?

Q. Yes. A. Yes, sir.

Q. And if you were at Cardiff, would you know how the rest of the cargo ought to be stowed so that the boat would go on to Rotterdam all right?

A. Yes, sir.

Q. And if you were at Rotterdam, would you know enough to take the Rotterdam cargo off and then put on enough ballast or whatever was necessary for her to go to Hamburg all right?

A. Yes, sir, at the expense of getting ballast.

Q. It might be expensive, but you could do it, couldn't you? A. Yes, it could be done.

Q. And you are positive of that, aren't you?

A. Yes.

TESTIMONY OF E. F. R. DE LANOY, FOR RESPONDENT.

E. F. R. DE LANOY, called for the respondent, sworn.

Mr. GRAHAM.—Q. With whom are you connected, Mr. De Lanoy?

A. The Holland-American Line.

Q. What is your position with the Holland-American Line? A. Pacific Coast Agent.

Q. How long have you been in San Francisco with the Holland-American Line?

A. A little over four years.

Q. You came here when? A. In August, 1920.

Q. Was that the date on which the Holland-

(Testimony of E. F. R. De Lanoy.)

American Line began its service from the Pacific Coast here? A. Yes, sir.

Q. In what service do you operate your vessels?

A. We have a joint service with the Royal Mail Steam Packet Co. from this coast to European ports.

Q. Just in general, what ports do you call at in Europe?

A. Our ports of call are Liverpool, London, Glasgow, Southhampton, Hamburg, Rotterdam and Antwerp.

Q. So you go up as far as Hamburg, and take in the British ports? [271] A. Yes.

Q. Do you ever take in Cardiff?

A. No, we never did.

Q. I show you here a copy of "The Guide," which has been introduced in evidence in this case, dated the 29th of this month, and ask you if you advertise in "The Guide"? A. Yes, we do.

Mr. MANNON.—If your Honor please, I will object to the testimony of this witness, in addition to the other objections and exceptions already reserved, on the ground that it now appears that this witness came here in August of 1920, some six or seven months after the "West Aleta" had stranded. It does not occur to me that this witness can testify about a custom, because he was not here to know about the customs. It does not occur to me he can testify how shipping was done out of this port, when it does not appear that he knows how shipping was done at that time.

(Testimony of E. F. R. De Lanoy.)

The COURT.—You offer this testimony for the same reason you offered like testimony this morning?

Mr. GRAHAM.—Yes, your Honor, to show the continuousness of this service, with no objection on the part of shippers.

The COURT.—It will be received under the same objection.

Mr. GRAHAM.—Q. If you will read the names of those ships in order, and the ports of call which they made, I think that will be sufficient.

A. The steamer "Nebraska," Glasgow, Liverpool, Southampton, London.

The motorship "Drechtdyk"—

The COURT.—Couldn't you ask him one general question and shorten this up?

Mr. GRAHAM.—Yes, I can, your Honor.

Q. From this advertisement which I show you, can you answer generally whether or not your vessels called at the ports of [272] call in Europe and in the United Kingdom in or out of their geographical order?

A. Some called out of their geographical order and some in geographical order.

Q. In other words, you just call indiscriminately?

A. That is right.

Q. Did you have a vessel sailing out of here within recent days called the "Moerdy"? A. Yes—

Mr. MANNON.—Just a moment. I object to that, your Honor, as immaterial, irrelevant and incompetent. It appears that this is something that

(Testimony of E. F. R. De Lanoy.)

only occurred a few days or a few months ago, in other words, just recently.

The COURT.—I will sustain the objection.

Mr. GRAHAM.—Q. On the "Drechtdyk," you have advertised London, Hamburg, Rotterdam and Antwerp: Is that in or out of geographical order?

A. That is very hard to say.

Q. She will make those ports in that route, will she? A. Yes.

The COURT.—Some of these matters have already been covered.

Mr. GRAHAM.—Yes, your Honor. I want to show that he does like everybody else does.

Q. What is your opinion as to the custom of the trade to operate in this service and to go beyond a port, as your advertisement indicates, and bring cargo back to that port?

Mr. MANNON.—We object to that question on the ground that it calls for the opinion of this witness. If this witness is to testify to custom, and there is some custom, we submit he should be asked on direct examination what the custom is, and if he says there is a custom, then he should state it.

The COURT.—Yes, I will sustain the objection. The objection, though, really goes to the form of the question.

Mr. GRAHAM.—Q. What can you tell the Court as to the custom [273] of your service to operate those vessels in that order, with cargo for all of those ports?

(Testimony of E. F. R. De Lanoy.)

A. It is our custom to go to the ports as a matter of operation.

Q. How do you inform the shippers of the order of the ports?

A. We advertise in different newspapers and issue a sailing card showing the ports of call of each vessel.

Q. How much weight do you give to the advertisements in "The Guide," as to their sufficiency?

Mr. MANNON.—That is objected to as immaterial.

The COURT.—Objection sustained.

Mr. GRAHAM.—Q. I show you a bill of lading which was used in this particular case, and will read to you the deviation clause: "To touch at any port or ports in any rotation or order in or out of the customary route, and to call at any port or ports more than once, unto the port of Rotterdam." Under such a phrase, can you tell the Court anything about the custom to operate in such an order, say, as Hamburg, Rotterdam and Cardiff?

A. The vessel has a right, under that clause, to proceed to some other port before going to Rotterdam or any port.

Q. What do you understand as to range of ports? Do you understand the term "range of ports"?

A. Yes.

Q. What does that mean?

Mr. MANNON.—We object to that because that term is not used anywhere except in the testimony

(Testimony of E. F. R. De Lanoy.)

of certain witnesses, and they, themselves, explained what that meant.

The COURT.—Objection overruled.

A. Range of ports is usually stipulated in charter parties, and is not applied to a regular trade, like we are engaged in from this coast to Europe.

Mr. GRAHAM.—That is all. [274]

Cross-examination.

Mr. MANNON.—Q. Under that clause that you referred to in that bill of lading, the liberty-to-call clause, where could that ship have gone, in your opinion?

A. It could go to the ports advertised before departure from this coast.

Q. Would it be limited to any advertised ports?

A. No, that ship would have a right to call somewhere else.

Q. Would it make any difference whether there were different advertisements in different newspapers, in your opinion?

A. Well, such a case may come up after the ship has been advertised for loading on this coast; there may be space available which can be filled at some subsequent port which is not advertised.

Q. So the ship could go to advertised ports and to some ports that were not advertised?

A. Yes, under certain conditions.

Q. How could you tell what ports besides those that were advertised she could go to under that clause?

(Testimony of E. F. R. De Lanoy.)

A. It all depends on the ports within reason on the way to the first port of call in Europe.

Q. For instance, could she have gone to Danzig?

A. No; pardon me—I hardly think so.

Q. What makes you think she could not go to Danzig?

A. Well, she may go to Danzig, after first calling at the ports advertised.

Q. Why couldn't she go to Danzig before she called at any of the ports advertised?

A. Because, like we do here, we advertise the ports of call and they are taken in rotation as advertised, so if we should go to another port that would make the last one.

Q. So it would be necessary for the ship to go to the ports in the order that they are advertised?

A. Oh, yes. [275]

Q. What would you do if you had two advertisements that were different? For instance, if you had one advertisement that read "Cardiff, Rotterdam and Hamburg," and another one that read, "Hamburg, Rotterdam and Cardiff," where would you expect her to go?

A. One of the advertisements would be wrong.

Q. And you couldn't tell where she was going, could you? A. If that was true, no.

Q. The only way you could tell where the ship was going, really, would be by the advertisements of the ship? A. Yes.

Q. Suppose the ship did not advertise at all where she was going, how would you tell?

(Testimony of E. F. R. De Lanoy.)

A. I would advise the shipper as to the ports of call in that particular case.

Q. You would advise them?

A. Advise them by letter or by telephone.

Q. That is the only way you could tell?

A. Yes, sir.

Q. Do you use a bill of lading in your business?

A. Yes, sir.

Q. Does it have a deviation clause in it?

A. Yes, sir.

Q. How does it read?

A. I could not tell you that by heart.

Q. Does it say you can go to a given port, and beyond that port, or not?

A. If I remember distinctly, it mentions that we can go to port or ports in any rotation, and beyond any ports mentioned.

Q. So that your bill of lading, in terms, says that you can go beyond any ports that are mentioned, doesn't it? A. Yes, sir.

Q. What is the reason for having that in your bill of lading, that you can go beyond any of the ports mentioned?

A. I don't know of any special reason.

Q. You use that bill of lading, yourself, do you not? A. Yes, sir.

Q. And you don't know why you use it?

A. That bill of lading was made in Europe, it was not made by me here in San Francisco. [276]

Q. And that is the bill of lading under which all of the goods are shipped that you refer to here?

(Testimony of E. F. R. De Lanoy.)

A. Yes, sir.

Q. The bill of lading that says your ships can go beyond the port of destination mentioned in the bill of lading? A. Yes, sir.

Q. And you would think ordinarily that your ships could go to any port you wanted to advertise them for, would you not, so far as your shippers of cargo are concerned?

A. We could go under the bill of lading, yes.

Q. You would have that perfect right?

A. Yes.

Q. And it would not make any difference whether they were European ports, or African ports—to take a very extreme case?

A. Well, within reason, I would say.

Q. How do you determine what is or is not within reason, if there is not any advertisement about it?

A. For instance, I would not send a ship that was advertised for certain ports in Northern Europe to the Mediterranean.

Q. But if it is not advertised at all, could you then send it to the Mediterranean?

A. Yes, according to the bill of lading, but it would be poor business, and for that reason we don't do it.

Q. But so far as your right is concerned, if you wanted to, you could advertise the ship and send her anywhere in the world?

A. We could not advertise the ship, no, because

(Testimony of E. F. R. De Lanoy.)

we have a regular service from this coast to Europe, and not around the world.

Q. What I wanted to find out from you was this: Suppose you were using a bill of lading like you used, you had some cargo that was destined for, say Hamburg, and you didn't have any advertisement at all of where your ship was going, could you take that cargo to other ports first, under your bill of lading? A. Yes, we can.

Q. Could you take, for instance, it to Danzig and back? [277]

A. Under certain conditions, yes.

Q. Or, if you wanted to, to take a most extreme case, under your bill of lading if there was not any advertisement involved, you could take it around the world the other way?

A. No, I don't think so.

Q. Why not?

A. Well, for instance, we would take cargo to a port advertised, in case we are prevented from discharging by strike or *force majeure,* or by some government regulation, then we would carry it to the next port closest to the original port of call.

Q. Does that bill of lading have something about strike and *force majeure?* A. Yes.

Q. Those things are all covered by your bill of lading, are they? A. Yes, sir.

Q. Under your bill of lading you could not take goods that were loaded, say, for Cardiff, you couldn't take them to Cardiff by going around the Cape of Good Hope, out of San Francisco, could

(Testimony of E. F. R. De Lanoy.)

you? You would have to take them through the Canal, do you think?

A. Well, I don't know all the clauses of the bill of lading by heart. I don't think we would accept such cargo under those conditions.

Q. But if you had accepted it, though, and you didn't have any advertisement at all about it, could you take it anywhere you wanted to, under your bill of lading, where you have the right to take it beyond the port of destination?

A. We may have the right, but we would discharge it at the next port closest to Cardiff.

Q. But you testified here to what somebody had the right to do under a bill of lading; under your bill of lading could you have taken those goods around the world if you wanted to, without any advertisement?

A. In case of strike or *force majeure* [278] and under certain conditions, I think we would.

Q. But, leaving out entirely those matters provided for by your bill of lading, suppose you wanted to take it to a great many other ports first, could you do it, without any advertisement at all?

A. I could not say yes or no.

Q. As a matter of fact, you don't think you have got a right to do that, do you?

A. You see, our bill of lading is made up for a special trade between this coast and Europe; there never enters the question of around-the-world service, or any service far away from the ports of call which we advertise.

(Testimony of E. F. R. De Lanoy.)

Q. But your bill of lading is made with reference to the service that you are in? A. Yes, sir.

Q. It is made with reference to the way you run your business?

A. Only for that particular service.

Q. And your bill of lading provides that you have the right to take the goods beyond the port of destination? A. Yes, sir.

Q. Is not that the reason why the words "beyond the port of destination" are used in the bill of lading, because you run your ships that way?

A. I do not know for what special reason it was put in. As I said, I did not make up that bill of lading. It has been made up in London, or in Rotterdam, where the head office is. They may have had more experience in cases of that kind.

Q. You didn't have anything to do with making up the bill of lading?

A. No, that was done in Europe.

Q. Where were you before July or August, 1920, where were you stationed?

A. I was in New York.

Q. How long had you been there?

A. About half a year.

Q. What were you doing there?

A. I was working in the freight department of the Holland-American lines.

Q. Do their ships touch at New York?

A. Yes, sir.

Q. And run from New York over to Europe?

A. Yes, sir. [279]

(Testimony of E. F. R. De Lanoy.)

A. And use the same kind of a bill of lading?

A. No, a different one.

Q. A different kind of a bill of lading?

A. Yes.

Q. Where do those ships go from New York to Antwerp, or where did they go at the time you were there?

A. They went from New York to Rotterdam only.

Q. From New York to Rotterdam direct?

A. Yes.

Q. And didn't make any other ports at all?

A. Except the passenger boats, landing passengers in England or France, but on those no freight was carried.

Q. No freight was carried on the passenger boats?

A. No.

Q. Prior to the time you were in New York, where were you located? A. I was in Chicago.

Q. Had you been there some time?

A. Yes, I was there seven or eight years.

Q. So you were not in San Francisco at all during 1919? A. No, sir.

Q. Nor in January of 1920? A. No, sir.

Q. If your bill of lading reads "to port of destination or beyond," that means, as you understand it, that you have the right to carry the goods beyond the port of destination on the ordinary route?

A. I don't know about the port of destination there; it says "port or ports, or beyond the ports."

(Testimony of E. F. R. De Lanoy.)

Q. "To port or ports, or beyond the ports"?

A. Yes; I don't know whether that word "destination" is in there. I don't recollect that at the present time.

Q. But that means that you can go to the port named, and then you can go beyond the port named in the bill of lading, doesn't it? A. Yes, sir.

Q. So that if you leave the words "beyond the port of destination" out of that bill of lading, then you have no right to take [280] it beyond the port that is named, have you?

A. I think the previous clause, that you can call at any ports, would be sufficient.

Q. That would mean that you could call at any port up to the port of destination, wouldn't it?

A. Or other ports, as long as it was advertised, I would say.

Q. So it does not make any difference, in your opinion, with regard to your bill of lading, whether it reads you can carry them to the port of destination, or you can carry your goods beyond the port of destination: Is that right?

A. No, I don't think so.

Q. You think it doesn't make any difference?

A. I think we have the right under both to call at all ports.

Q. For the reason that you have a bill of lading that covers beyond the port of destination?

A. Yes, sir.

Q. About the issuance of a bill of lading, will

(Testimony of E. F. R. De Lanoy.)

you describe to the Court just how a bill of lading is issued?

A. When cargo is delivered to the dock, a dock receipt is usually made out, and that dock receipt is presented to the office, and bills of lading are made out according to the marks and the numbers on the dock receipts.

Q. Then what do you do with the bill of lading?

A. That is signed and stamped with the different stamps, the original, and the copy, and then handed to the shipper against payment of freight.

Q. What does the shipper do with it, how does he use it in his business, do you know?

A. I have only a vague idea, because that is not within my line.

Q. You have never done that, yourself?

A. No, I am not a merchant.

Q. In regard to the various clauses in the bill of lading, did you ever look at a bill of lading to see what you have a right to [281] do at all in shipping?

A. Yes, I have read them once, or twice, maybe.

Q. In fact, when the question arises as to what you can do with your cargo, you look at your bill of lading, don't you? A. Yes, sir.

Q. And that is what the bill of lading is for, ordinarily?

A. Yes, the conditions under which the cargo is accepted.

Q. The bill of lading shows the contract between the parties, doesn't it?

(Testimony of E. F. R. De Lanoy.)

A. Yes; we agree to transfer freight for a certain party under certain conditions.

Q. That is what the bill of lading is for, isn't it?

A. Yes, sir.

Q. Do you know anything about cargo claims, claims made on account of damaged cargo, or non-delivery of cargo, or anything of that sort?

A. Yes, sir.

Q. You are familiar with that kind of claims?

A. Yes. I am only familiar with cargo from Europe to this coast.

Q. When you have claims on account of damaged cargo, or lost cargo, do you look at the bill of lading to see about what your rights are?

Mr. GRAHAM.—I object to that as not proper cross-examination. This witness did not testify to anything on his direct examination about claims or about damaged cargo.

The COURT.—I will overrule the objection.

A. Yes, I do.

Mr. MANNON.—Q. And then you determine what you can do by what the bill of lading says?

A. Yes, sir.

Redirect Examination.

Mr. GRAHAM.—Q. Do I understand you to have said in answer to Mr. Mannon's question that as far as you are concerned your idea is that under a clause such as I have quoted to you, "with [282] liberty to touch at any port, in any rotation or order, in or out of the customary route," that that

(Testimony of E. F. R. De Lanoy.)

gives you the same privilege as a bill of lading which has the words in it, "or beyond"?

A. Yes, I would say so.

Q. What papers did you advertise in, or do you advertise in now?

A. We advertise in "The Guide," and the "Daily Commercial News," I believe, and some weekly and monthly magazines.

Q. As to "The Guide" and the "Daily Commercial News," just briefly state your idea of what those two papers are used for. What is the purpose for which you advertise in "The Guide," and in the "Daily Commercial News," or one or the other?

A. The purpose is to acquaint the shippers with sailings our line offers to Europe.

Q. Am I correct in understanding that you testified that a ship customarily follows the advertised route, so far as you know?

A. Yes, we do that.

Mr. GRAHAM.—That is all.

Mr. MANNON.—No further questions.

TESTIMONY OF FRED L. DOELKER, FOR RESPONDENT.

FRED L. DOELKER, called for the respondent, sworn.

Mr. GRAHAM.—Q. With whom are you associated, Mr. Doelker? A. W. R. Grace & Co.

Q. With whom were you associated in 1919 or 1920?

(Testimony of Fred L. Doelker.)

A. W. R. Grace & Co., General Agents for the Johnson Line.

Q. Are Grace & Co. still the General Agents for the Johnson Line? A. Yes, sir.

Q. What was your position with them and what is your position now? A. Traffic Manager.

Q. How long have you been engaged in the shipping business? A. Since 1909. [283]

Q. How long have you been in the traffic department? A. Since 1917.

Q. How long have you been handling the Johnson Line? A. Since 1917.

Q. What service do they engage in?

A. European service, Scandinavian.

Q. In general, just name the ports in which they ordinarily call—not necessarily in order.

A. Christiania, Gothenberg, Malmo, Copenhagen, Stockholm, Hamburg, occasionally U. K. and Irish ports.

Q. So you are familiar with this so-called European-Pacific service? A. Yes, sir.

Q. I show you a copy of an advertisement under the caption "The Johnson Line," indicating sailings from the Pacific Coast for Scandinavian ports: Do you recognize either of those two ships, the "Suecia" and the "San Francisco"?

A. Yes, sir.

Q. Those two ships were engaged in this trade at that time, the European-Pacific trade?

A. Yes, sir.

(Testimony of Fred L. Doelker.)

Q. And they called at the ports you have indicated or at some of them?

A. Some of the ports.

Mr. MANNON.—Mr. Graham, what is that you are reading from?

Mr. GRAHAM.—"The Guide." It is the ad of the Johnson Line in "The Guide" of June 5, 1920.

Q. Will you just briefly state to the Court the practice or the custom of your line at that time in the operation of vessels in the European-Pacific Service, with relation to the ports of call, in or out of their order.

A. I don't recall what ports these two boats went to, but our regular trade is the Scandinavian trade. We call at ports in England, Ireland, France, or Germany, as we require cargo for filling up. We have a boat now that is going direct to Hamburg on account of our fruit business, and from there she is going over to England, and then on to [284] Scandinavia. It just depends on the cargo offerings which way our boats go.

Q. Can you say that you do or do not route your vessels, either now, or back in 1920, in or out of geographical order? A. Both ways.

Q. In other words, you don't pay much attention to the order?

A. It depends on conditions. Our ultimate destination is Scandinavian ports; the other ports in the United Kingdom or the Continent we make as we require cargo for filling up.

Q. In your position with Grace & Co., are you

(Testimony of Fred L. Doelker.)

familiar with what other lines did in 1919 and 1920 in this service? A. Just what do you mean?

Q. As to the operation of their vessels, as to ports of call, what was their custom, did they go in certain order, or did they have any order, or just what was it?

A. I cannot say that they had any particular order; it would depend on the conditions, cargo offerings.

Q. So you cannot say whether they did have any order, or no order? A. I cannot, no, sir.

Q. Did you have a vessel sailing out of there, say last month? What was your last vessel out for those ports?

A. The last vessel was the motorship "Canada" on November 26th.

Q. Where was she scheduled to go?

A. She went via the Canal to Hamburg, and probably a U. K. port, and then on to Scandinavia.

Q. How was that with reference to geographical order, was it in or out of geographical order?

A. That would be out of geographical order if she went to a U. K. port after she left Hamburg.

Q. Is that what she was going to do?

A. She was going direct to Hamburg, and she had a grain cargo, and we don't know where that was to be discharged, it may be ordered to Liverpool, or it may be ordered to Leith, or she may go on to Scandinavia; the [285] shipper has the option of a U. K. port.

Q. I show you here a United States Shipping

(Testimony of Fred L. Doelker.)

Board bill of lading, which is in evidence in this case, and ask you if you have ever had any experience in the use of these bills of lading? That is the ordinary Pacific form.

A. No, sir, not that particular bill of lading. We have our own bill of lading for the Johnson Line service.

The COURT.—You want to know whether he has had any experience with a bill of lading containing—

Mr. GRAHAM.—I wanted to know, first, your Honor, if he knew this bill of lading, if he was familiar with it.

Q. I will read you the deviation clause in this particular bill of lading, and ask you whether you have ever had any experience with similar clauses in your own bill of lading: "To touch at any port or ports, in any rotation or order, in or out of the customary route, and to call at any port or ports more than once"; have you had any experience with a clause similar to that?

A. Our clause is similar to that in our Johnson Line bill of lading.

Q. And you have testified it is your custom to go out of the geographical order under that clause?

A. Under that clause, yes, in the European trade.

Q. What notice do you usually give to shippers of your intention to go in one or in another direction, or the ports of call?

A. We give them written notice if we know here

(Testimony of Fred L. Doelker.)

at the time where the boat is going; if we don't know, we simply say she may call at European ports, and we don't name them.

Q. You don't name them?

A. Not the European ports. The Scandinavian ports we name, because that is our ultimate destintion.

Q. Do you consider, as a steamship operator, that this clause [286] permits you to run your service as you do run it, and that it is customary?

A. Yes, sir.

Q. Do you advertise in "The Guide" now?

A. Yes, sir.

Q. What is your ad for, what is your purpose in putting the ports of call in "The Guide"?

A. To keep the shippers informed as to what our ports are.

Q. That is the manner in which you inform them, is it?

A. So they will know our sailings, yes.

Q. From "The Guide"?

A. From "The Guide."

Q. And you were familiar with the custom in 1919 and 1920 in this European-Pacific service, were you? A. Yes, sir.

Q. Could you or could you not say it was customary to operate ships from the Pacific Coast in that trade in a route, say, Hamburg, Rotterdam and Cardiff?

A. Well, as far as the Johnson Line is concerned,

(Testimony of Fred L. Doelker.)

yes, we would consider we could do that under our contracts and bills of lading.

Q. And your contract, you have testified, was the same as this? A. More or less.

Q. You don't know the exact wording of it?

A. I have a copy of our bill of lading.

Q. You have it with you? A. Yes.

Q. May I see it, please?

A. Yes; this was in October, 1921.

The COURT.—I suppose this evidence is all clearly admissible on the theory of a practical interpretation or construction of that particular provision of the bill of lading?

Mr. GRAHAM.—Yes, your Honor.

Mr. MANNON.—But subject, from our point of view, your Honor, to the objections we have already reserved, and we will argue those later, if we may.

The COURT.—Yes. Are the provisions similar? I see you [287] have been comparing them.

Mr. MANNON.—Somewhat similar, but each bill of lading, we shall contend, is different; we shall expect to point out in each one of them where the difference is.

Mr. GRAHAM.—Q. I will read to you the clause which I find in your bill of lading which you have just handed to me, and which is used by yourselves in the Johnson Line service to Europe—

The COURT.—And which is claimed is similar to the particular provision under investigation here.

Mr. GRAHAM.—Yes, your Honor, which is claimed by us is exactly the same.

(Testimony of Fred L. Doelker.)

"To touch at any port or ports in any rotation or order in or out of the customary route, and to call at any port or ports more than once unto the port of" —whichever port it might be. Now it is my understanding—

Mr. GRIFFITHS.—Pardon me, Mr. Graham, there being filled in at the point where you left off reading the port of destination.

Mr. GRAHAM.—Yes, Mr. Griffiths, I intended to say that.

Q. (Continuing.) It is my understanding that your custom is to operate as you state, under that bill of lading. The deviation clause in your bill of lading being similar to the one under investigation in the Shipping Board bill of lading, you would say that this vessel did not violate the custom in going in the order "Hamburg, Rotterdam, Cardiff": Is that correct?

Mr. MANNON.—If your Honor please, we object to that question as leading.

The COURT.—It is leading, and it is repetition; he has already so testified. I will permit it, however.

A. Yes, I would say so, I would say that that is my interpretation. [288]

Mr. GRAHAM.—Q. I would like to know what a customary route would be in the European-Pacific Service under the words "out of the customary route"; what does that mean?

A. Well, if a vessel went from the Canal to

(Testimony of Fred L. Doelker.)

London and went down to Brazil, she would be out of the customary route.

Q. Would you say a vessel had a right to do that under such a clause?

A. I don't know, I doubt it.

Q. How far could a vessel operate in the European-Pacific service under such a clause, "out of the customary route"?

A. I don't know, but my opinion is that she could make any deviation.

Q. You mean within that range, up there?

A. Any range.

Mr. MANNON.—Now just a minute. That is objected to as leading, if your Honor please, and as immaterial.

The COURT.—I will allow the answer to stand. He says "any range."

Mr. GRAHAM.—Q. Are you familiar with bills of lading which have the words, "or beyond" in addition to these words I have quoted to you?

A. No, I cannot say that I am, offhand.

Q. You cannot say you have ever heard of that?

A. No.

Q. It might be possible that there are such bills of lading? A. Yes, it might be possible.

Q. Would you think that such a clause would give a vessel a customary right to go in any other route than this clause here would give them?

A. I don't know.

Q. What do you understand by the use of the word "via" in a bill of lading? Have you had any

(Testimony of Fred L. Doelker.)

experience in using that word? Do you use it at all? A. Yes, we use it.

Q. What does it mean in the trade?

A. A transshipment port.

Cross-examination.

Mr. MANNON.—Q. I understand your testimony to be substantially, [289] in regard to this bill of lading, the Shipping Board bill of lading, Pacific form, that has been shown you, that where those words are used the boat can go in or out of the customary route, she can go practically anywhere? A. Anywhere, yes.

Q. Who drew this bill of lading, do you know?

A. We make that bill of lading up here.

Q. When you say "We do," who makes it up, specifically?

A. Under my supervision and the approval of my principals.

Q. What does this clause mean, I want to read Clause 10 on the back of it: "Also if a vessel entrusts or delivers the aforesaid merchandise or treasure to any other vessel, steam, motor or sail, her agents or other person, for the purpose of being forwarded to any port or place other than the regular ports in the customary route of this line, or to any port in said customary route at which the vessel may not call on her present voyage, which the steamer is hereby authorized to do, such company or person so selected shall be regarded exclusively as the agent of the shipper or owner,

(Testimony of Fred L. Doelker.)

and such agent shall alone be liable." The part of it that I wanted to ask you about particularly was what this means, "which the steamer is hereby authorized to do."

A. That gives the vessel the option to transship if she don't want to call at the port, on account of insufficient quantity of cargo.

Q. And "which she is hereby authorized to do," means that she can call at substantially what ports she wants, or can omit ports?

A. Yes, or omit ports.

Q. That is what Clause 10 is put in there for?

A. To give her the option. She may advertise a port and not get sufficient cargo, and she can transship the cargo, rather than go to the expense of calling at that port.

Q. You don't know whether there is any such clause in the Shipping Board bill of lading that was shown to you, or not, do [290] you?

A. I do not.

Q. There is not any such clause, as a matter of fact. A. I don't know.

Q. Clauses with regard to liberty to call, or deviation, are put in various bills of lading used by San Francisco shippers, are there not?

A. Not by the shippers; the steamship people make up the bill of lading.

Q. And your bill of lading is not like other bills of lading in every particular, is it?

A. Not necessarily, no, sir.

(Testimony of Fred L. Doelker.)

Q. And there are reasons for the variations, I suppose?

A. According to the individual company, yes.

Q. When claims arise on account of damages to cargo, I take it you interpret your rights by what is in the bill of lading, do you not?

A. By our own bill of lading.

Q. And not by what is in the bill of lading of anybody else? A. No, sir.

Q. And not by custom?

A. By our own bill of lading.

Q. The bill of lading is the thing that determines that? A. Our own bill of lading.

Q. I want to show you this same bill of lading of the Shipping Board; they have a stamp on here, they have stamped the words on here which are as follows: "The vessel shall have liberty to deviate for the purpose of making trial trips." What is meant, if you know, by that word "deviate"?

A. I don't know, but I assume it means she wants to make a special trip for testing out the engines.

Q. What does "deviate" mean, if you know, with regard to shipping?

A. I would say that "deviate" in that case would mean to go out of the customary route.

Q. Did you ever hear of deviation in connection with shipping matters?

A. That deviation there is not a cargo deviation; that [291] is deviation in regards to the condition of the vessel. They want to find out the condition of the vessel before she starts on her voyage.

(Testimony of Fred L. Doelker.)

Q. What does it mean, though, in regard to "deviate"? She deviates from some of the voyage, does she?

A. That is the first time I have seen that clause; I have heard of it before, but this is the first time I have seen it. We don't use the clause.

Q. You could not tell? A. No.

Q. In your bill of lading, do you use the word "deviation" at all?

A. I don't know without reading the bill of lading over.

Q. You couldn't tell that? A. No.

Q. Do you know of such a term used at all in regard to shipping?

A. Yes, I have heard the term used.

Q. What do you understand the term to mean in shipping? A. To deviate?

Q. Yes. A. To go out of her regular route.

Q. So that, under the clause in that Shipping Board bill of lading, you looked at, where she could go in or out of her customary route, that would mean that you could take the ship and cargo practically wherever the ship owner wanted to?

A. I would say so.

Q. Under a clause that reads like this, would you tell me what you would understand it to mean, where the ship might go: "Now lying in the port of Fiume and bound for Dunkirk, with liberty to call at any port or ports in any order whatsoever, and to be delivered in like order and condition in the aforesaid port of Dunkirk." Under a bill of lad-

(Testimony of Fred L. Doelker.)

ing like that, for instance, could the ship go to Glasgow? A. I would say so, yes.

Q. There would not be any question about that in your mind, would there?

A. No, sir. I would say so. [292]

Q. Could she, however, come to a port in America, under that bill of lading, where she is going from Fiume to Dunkirk?

A. I would say she could if she were in distress, or something like that.

Q. But unless there were peculiar circumstances, could she?

A. Yes, I would say that she could go to America under the deviation clause.

Q. Under a deviation clause that reads like this, I would like to know where the ship might go; "With liberty to proceed and to stay at any port or ports in any routes in the Mediterranean, Levant, Black Sea or Adriatic, or the coast of Africa, Spain, Portugal, France, Great Britian and Ireland, for the purpose of delivering coals, cargo or passengers, or for any other purpose whatsoever." Under a deviation clause like that, could the ship go from Malaga, in Spain, up to a port like Burriana, in the Mediterranean?

A. I would say so, but I would say she could not go to America in that case.

Q. Why couldn't she go to America in that case?

A. Because the clause is more or less restricted to names and countries.

(Testimony of Fred L. Doelker.)

Q. But she could go to any of the ports in those countries?

A. She could go to any of the ports in those countries.

Q. But not to America? A. No.

Mr. MANNON.—If your Honor please, the first deviation clause I read to the witness was read from the case Leduc vs. Ward; the second deviation clause I read to the witness was read from the case of Margretson vs. Glynn.

Q. If you have a deviation clause like that one we have been talking about in the Shipping Board form, and cargo was shipped on a boat out of San Francisco to any port, she can go to practically any other port, can she, under that clause?

A. Under that clause, yes. [293]

Q. It doesn't make any difference where the other port may be?

A. I would say it makes no difference.

Q. And that is the custom, and has been the custom in San Francisco during the time you have testified about? A. Yes, sir.

Q. Where else do Grace & Co. advertise the Johnson Line besides in "The Guide"?

A. I think in the "Commercial News" at that time, and the "Shipping Register," and the "Journal of Commerce."

Q. Is this "Shipping Register" you speak of a reliable paper?

A. Yes, I would say so. I am not sure that it

(Testimony of Fred L. Doelker.)

was in existence at that time. The Johnson Line has advertised in it since it has been in existence.

Q. Of course, if you are not sure that it was in existence, you could not say whether it was reliable or not, referring to 1919.

A. I don't know as to 1919.

Q. You think the "Commercial News" is a reliable? A. Yes, sir.

Q. You think "The Guide" is reliable?

A. Yes, sir.

Q. That is why you advertise in them, I suppose?

A. Yes, sir.

Q. I suppose those papers make mistakes sometimes, don't they?

A. I don't know, but any of us are liable to make mistakes.

Q. You would expect sometimes those papers to be wrong, wouldn't you? A. Possibly.

Q. You said something about sending out written notice to your shippers as to where your ships were going.

A. Yes, we send out notices from time to time.

Q. And those notices tell where your ships are going?

A. More or less; they are subject to correction under certain conditions.

Q. And you use the telephone sometimes, do you, to notify shippers as to where the Johnson ships are going?

A. Yes, we sometimes use the telephone.

(Testimony of Fred L. Doelker.)

Q. You do quite a business over the telephone, don't you? [294]

A. Our department uses the telephone quite a little; some demand letters.

Q. And you do business by mail? A. Yes, sir.

Redirect Examination.

Mr. GRAHAM.—Q. On this question of deviation, you testified that in your opinion the ship could take the regular route or the customary route; what would you deem to be the customary route, or how would you fix the customary route, by what means, how would you know what was the customary route?

A. I would say owing to the trade she was employed in.

Q. What port would that take in?

A. The Johnson Line would take in any ports in Europe.

Q. Any ports in Europe? A. Yes.

Q. And whether you advertised, or not?

A. And whether we advertised or not.

Q. You do not make it a practice to send out these notices that Mr. Mannon spoke about, do you?

A. We send out notices from time to time.

Recross-examination.

Mr. MANNON.—Q. Speaking of this customary route matter, the vessels of your line, without any deviation clause at all, could go to any of the European ports you mentioned, couldn't they?

(Testimony of Fred L. Doelker.)

A. No, sir, I would not say so. If we didn't have a deviation clause we probably could not go from Hamberg over to London, we would have to go to London first.

Q. The deviation clause is what provides for that? A. That is my understanding of it.

Q. And you rely, then, on the deviation clause to protect you in sending your ships out?

A. Yes, sir.

Q. In doing that you rely on that clause No. 10 on the back of [295] your bill of lading, the clause that I read to you, do you not?

A. For transshipments, yes.

Q. Is it necessary to have the bill of lading to protect you, or would custom protect you in doing that, do you think?

A. I would say that we would have to have a bill of lading to protect us.

TESTIMONY OF HARRY L. EVANS, FOR RESPONDENT.

HARRY L. EVANS, called for the respondent, sworn.

Mr. GRAHAM.—Q. With whom are you associated, Mr. Evans? A. E. C. Evans & Sons.

Q. With whom were you associated in 1919 and 1920? A. E. C. Evans & Sons.

Q. What is your position with E. C. Evans & Sons? A. Secretary.

Q. What is the general business of E. C. Evans & Sons?

(Testimony of Harry L. Evans.)

A. Steamship agents, shipping and commission.

Q. That is, you both ship and operate ships?

A. We don't ship; we act as steamship agents, and also as chartering brokers, and freight brokers.

Q. So you are interested in the steamship end of the business, rather than in the shipping end of the business. How long have you been engaged in that business? A. Seventeen years.

Q. In San Francisco.

A. Do you mean myself, personally, or do you mean the firm?

Q. You personally. A. Seventeen years here.

Q. How long has the firm been engaged in business? About 40 years.

Mr. MANNON.—It is a thoroughly established firm.

Mr. GRAHAM.—Q. Are you familiar with the trade known as the European-Pacific service, from the Pacific Coast? A. I am.

Q. You have operated, or taken part in the operation of vessels [296] in that service?

A. Yes, sir.

Q. When did your first connection with this European-Pacific service take place, how far back does it date? A. About 15 years ago.

Q. What line was that?

A. It was then known as the Maple Leaf line.

Q. Within what generel range were they operating?

A. From the Pacific Coast through Magellan to ports in the United Kingdom and the continent.

(Testimony of Harry L. Evans.)

Q. They *were* to continental ports, did they?

A. Yes, sir.

Q. What were some of the ports they went to, say U. K. and continental ports?

A. They made Swansea, London, Dunkirk, and even Antwerp.

Q. Did any of them go as far north as Hamburg?

A. Occasionally, yes.

Q. How long did the Maple Leaf Line operate?

A. From about 15 years ago up to the time of the war.

Q. During the war did you have any connection with European-Pacific trade at all? A. No.

Q. Since the war what has your connection been?

A. The Isthmian Steamship Lines, which were in the same ownership as the Maple Leaf Line, recommenced operations in the same year, and we acted as the general agent, and do act as the general agent on the Pacific Coast for the Pacific U. K. service of the Isthmian Lines.

Q. When did they start their service after the war? A. 1920.

Q. And is still operating now? A. Yes.

Q. Have you ever had any connection with the operation of Shipping Board vessels during that period?

A. We operated several as tramps carrying full cargoes chiefly to Europe, and one steamer which we loaded on the berth.

Q. Which steamer was that?

A. The "Bakersfield." [297]

(Testimony of Harry L. Evans.)

Q. Do you remember the ports she went to?

A. She was loaded for London and Swansea, and was later put into Newport, instead of Swansea, on account of congestion at Swansea.

Q. At what other ports did she call—just those two ports?

A. Just those two. I believe she returned to London and loaded back to New York after she completed discharging.

Q. Was that the first voyage of the "Bakersfield"? A. Yes, it was.

Q. Did you have anything to do with the "Bakersfield" on her second voyage? A. No.

Q. Can you tell the Court just briefly the custom of the trade operating out of San Francisco, here, in the European-Pacific service, with relation to calling at ports of call in or out of their geographical order, what is the general practice, and what do you people do?

A. It is generally the practice in that trade to follow the order which would be most suitable to the particular requirements of the trade at the time. Our particular steamers follow a regular outlined schedule or a regular set of ports.

Q. You do?

A. We are a little exceptional in that, except for the extra steamers which we occasionally have, when they are not needed on the other runs.

Q. How do you run those extra steamers?

A. We run them to such ports as appear most profitable at the time.

(Testimony of Harry L. Evans.)

Q. What regard do you have to the geographical order of the ports in that service and in the operation of these vessels?

A. We always endorse the order of discharge ports on our bill of lading. And is that order in or out of the geographical order?

A. As a rule it is the geographical order, but not necessarily.

Q. Generally geographical?

A. Depending on the stowage.

Q. Do you know what the custom is among other lines here in San [298] Francisco, the general custom here in San Francisco—you have been in the business a good many years, and are pretty familiar with it; what is the general custom, if you know?

A. Generally speaking they follow the geographical order, except at such times as cargo requirements force them out of it.

Q. Cargo requirements might force them to some other order? A. Yes.

Q. I suppose it depends entirely on the vessel, as to how much the cargo requirements would force them out? A. Yes.

Q. Have you ever had any experience with Shipping Board bills of lading? A. A limited amount.

Q. What did you use on the "Bakersfield"?

A. We used the regular form.

Q. The Shipping Board form? A. Yes.

Q. So that you have had some experience with them? A. Yes.

(Testimony of Harry L. Evans.)

Q. I will read to you a clause which is contained in the Shipping Board bill of lading, regular form, used on the steamship "West Aleta," with regard to the deviation clause; it reads as follows: "To touch at any port or ports, in any rotation or order, in or out of the customary route, and to call at any port or ports more than once, unto the port of Rotterdam"; under that clause, what would your opinion be as to the customary rights of the shipping company in the operation of these vessels? In other words, could they go out of the geographical order and, say, make the trip that the "West Aleta" was intended to make, Hamburg, Rotterdam and Cardiff, would that be customary at that time under these bills of lading?

A. It was customary at that time.

Q. So that the "West Aleta" was performing the customary voyage which was permissible under this bill of lading with that clause? A. Yes, sir. [299]

Mr. GRIFFITHS.—We object to these leading questions. All of this examination has been leading.

The COURT.—Yes. Be careful about that.

Mr. GRAHAM.—Yes, your Honor.

Q. Are you or are you not familiar with bills of lading having this clause, and in addition the words "or beyond"? A. Yes.

Q. You do know of such a bill of lading?

A. Yes.

Q. Can you briefly tell the Court the customary

(Testimony of Harry L. Evans.)

route which a vessel will take under those two forms; is there any distinction in your mind as to one or the other, this clause or the one with this clause and in addition the words "or beyond"?

A. I think the one is simply more restricted than the other.

Q. Just what do you mean by that, in what way is one any more restricted than the other? Would you say that this specific form that you are familiar with restricted the vessel from doing what the "West Aleta" did do, or do you not?

Mr. MANNON.—I think that question is too long and too involved for the witness to answer.

Mr. GRAHAM.—I am trying to get his interpretation of the custom to operate under this bill of lading.

The COURT.—I will overrule the objection.

A. May I look at this? It has been five years since I looked at any of these. We have our own clauses. The wording in this clause should give—whether or not it does legally, or not, I don't know, but it should give, and the intention of it was, to allow the steamer to do exactly what this steamer did. At that time it seemed to be generally the opinion that this clause did allow that.

Q. That is, to make the voyage—

A. To make the voyage in such routes as the stowage, the port conditions, and the cargo required under those particular times. Where is that other clause? [300]

Q. That is the only one.

(Testimony of Harry L. Evans.)

The COURT.—Q. Where the word "beyond" is used. A. Yes.

Mr. GRAHAM.—That is in another bill of lading. I am asking you if you are familiar with that clause in that bill of lading. A. Yes, I am.

Q. I am trying to find out from your opinion as to the relative distinction by adding the words "or beyond"; you have testified that in your opinion the ship could do what she did do in this case? A. Yes, sir.

Q. What papers do you advertise the sailings of your vessel in, or what papers did you advertise them in at that time?

A. We advertise in "The Guide."

Q. Any others?

A. Possibly in others, but I cannot recall them. It is five years ago.

Q. The "Daily Commercial News"?

A. Very likely, but I couldn't be sure about that.

Q. You mentioned "The Guide." What was your purpose in advertising in "The Guide"?

A. To solicit cargo, and also, from our standpoint—the chief purpose was to solicit cargo, and to notify shippers where our steamers were going and try to get our cargo; incidentally, we attempted to establish our route.

Q. That is, you proposed to follow a route which was in "The Guide," or not to follow it, which?

A. To follow it.

Q. How about the reliability of "The Guide"; did you find it reliable, or not?

(Testimony of Harry L. Evans.)

A. Very reliable.

Q. How did they get the information which they put in the paper?

A. By checking up at each office every day.

Q. How about the "Daily Commercial News," do you remember about that?

A. The "Daily Commercial News" was also reliable; I did not place quite as much stress on its reliability as on the other, but they could be considered as fully reliable. [301]

Q. How did they get their information?

A. In much the same way.

Q. If there were two advertisements appearing in these two different papers, and one was different from the other, could you or could you not say that more reliance could be given to one of the papers, or more to the other?

Mr. MANNON.—I submit that that is immaterial.

The COURT.—Objection sustained.

Mr. GRAHAM.—Q. You don't remember the "Bakersfield" voyage No. 51?

A. I only remember the particular voyage, I don't remember the voyage number, the one I spoke of was in December, 1919, when we handled her.

Q. Did or did not that vessel have any cargo for the California Wine Association, or do you remember? A. It did.

Q. You remember that it did? A. Yes.

Q. Do you remember where it was going?

(Testimony of Harry L. Evans.)

A. Yes, it had a considerable quantity for Swansea.

Q. Did they discharge it at Swansea?

A. Finding congestion at Swansea, they discharged it, with the agreement of the consignees, at Newport.

Q. Who did you do your business with over there in the California Wine Association, or did you do the business?

Mr. MANNON.—I submit that that is immaterial, if your Honor please.

The COURT.—Objection sustained.

Mr. GRAHAM.—Your Honor, I am trying to show that the California Wine Association made other shipments. Mr. Evans just testified that this ship sailing in December, 1919, which was very close to the time of the sailing of the "West Aleta," I am briefly trying to show the manner in which the business was done with the California Wine Association, with another steamship operator who was operating in the same general manner as [302] the Williams-Dimond Co. is shown to have operated. It is for the purpose of showing the manner in which the California Wine Association did their business. The California Wine Association witnesses are necessarily adverse witnesses to me.

The COURT.—Where the deviation clause was the same as here do you mean?

Mr. GRAHAM.—The deviation clause is exactly the same. Mr. Evans has already testified that the

(Testimony of Harry L. Evans.)

bill of lading was the Pacific Form of the Shipping Board.

The COURT.—Objection overruled.

A. We did our business with Mr. Jenks, I think his name was, the traffic manager, and Mr. Sheehan, his assistant.

Q. What was the method of doing business, how did you conduct your negotiations?

A. In saying we did business with him, and thinking it over, in this particular case this cargo was procured by Williams-Dimond, but in other cases in which we had shipments outside of these boats at a later date, we merely went to them, knowing they had cargo to freight to certain ports, and negotiated with them with a view to making a commission for ourselves for the freighting of that cargo.

Q. In other words, that cargo was being put on vessels operated or not operated by yourselves, which was it?

A. On that particular one, the boat was chartered by us to a firm in Seattle, and we also made the contract for that firm; we engaged the cargo on behalf of the Wine Association with that firm, and then chartered the steamer for a lump sum to a firm in Seattle, and acted as brokers for both of them.

Q. What was the name of that vessel?

A. The "Xenia."

Q. When did she sail?

A. I think within 24 hours of the prohibition law.

(Testimony of Harry L. Evans.)

Q. Do you remember that date?

A. I don't remember that date. [303]

Q. You say within 24 hours of the prohibition law.

A. Within 24 hours of the time it became effective, when this cargo could not have moved. We were required to get this cargo out by a certain date.

Q. I show you here what purports to be an ad of E. C. Evans & Sons, captioned, "Hamburg direct, American S. S. 'Xenia' sails January 14." Is that approximately the date, or do you remember?

A. That is it.

Q. Did she make Hamburg direct, as you advertised it? A. She was diverted to Bremen.

Q. After getting out?

A. After leaving Norfolk, where she called for bunkerage.

Q. What did she have on board?

A. Wine, with a small amount of milk, canned milk.

Q. Who was the wine shipped by?

A. The California Wine Association.

Q. All of it? A. Yes.

Q. Where was only one port, as I understand it?

A. One port.

Q. And it all went to one port? A. Yes, sir.

Q. Am I correct that your negotiations in that case were with Jenks? A. Yes.

Q. Do you know whether or not the California Wine Association knew she was making one or more than one, or any number of ports?

(Testimony of Harry L. Evans.)

Mr. MANNON.—I submit it does not make any difference in regard to some voyage that is not involved here, your Honor.

The COURT.—I think so. It seems to me that this examination is taking too wide a range.

Mr. GRAHAM.—Q. In your dealings with the California Wine Association, in all of your dealings, did they ring you up and ask you the route, or didn't they, or how did they find out the route, or do you know?

A. No, they did not. There was nothing [304] in the contract requiring our going there, although as a matter of fact we familiarized them with the fact that the steamer was simply making that port.

Q. You did yourself? A. Yes, sir.

Mr. GRAHAM.—That is all.

The COURT.—We will take our adjournment now until to-morrow morning at ten o'clock.

(An adjournment was here taken until to-morrow, Wednesday, December 31, 1924, at ten o'clock A. M.)

[Endorsed]: Filed Jan. 17, 1925. [305]

Wednesday, December 31, 1924.

H. L. EVANS, cross-examination.

Mr. MANNON.—Q. Have you always been in the shipping business in San Francisco, Mr. Evans?

A. Yes.

Q. You have not had experience in any other port than San Francisco?

A. I have traveled up and down the Coast, but not permanently in any other port.

(Testimony of Harry L. Evans.)

Q. Of course, you have had to do with bills of lading around the various ports of the world?

A. Yes.

Q. You have been asked and answered some questions about a bill of lading. Will you state to the Court what, among shipping men and shippers of goods, a bill of lading is?

A. A bill of lading is a receipt for the goods, with a description of the intended disposition of the goods, and acts as a receipt for the goods until delivery is made.

Q. It is also a contract of carriage for the goods, isn't it? A. Yes.

Q. The bill of lading is always so described, is it? A. Yes.

Q. As between the shipper and the ship, the bill of lading is the last document that passes, is it not? A. Yes.

Q. And when discussions come up in your business experience as between the shipper and the ship owner and carrier, you always have recourse to the bill of lading, to see what can be done, do you not? A. Yes.

Q. It is a fact, is it not, that in the transit of goods by sea, where a common carrier is handling them, a bill of lading is always issued? A. Yes.

Q. And it is also the fact, is it not, that the bill of lading is said among shipping men to stand for the goods? A. Yes. [306]

Q. And you, of course, are familiar with the

(Testimony of Harry L. Evans.)

practice of sending a draft against the bill of lading through the bank? A. Yes.

Q. The things that are sent through the bank are bills of lading, insurance policies, invoices and drafts? A. Yes.

Q. And that is an almost universal custom with regard to transacting foreign business among shippers, is it not? A. It is.

Q. And that, by the way, is the way goods are imported into San Francisco from European ports very frequently, is it not? A. Yes.

Q. In answering some questions concerning this bill of lading yesterday you were shown this form of the Shipping Board's bill of lading; on the face of it is the word "deviation"; will you please explain what is meant amongst shipping men by "deviation"?

A. "Deviation" is a rather poorly defined term among shipping men. It has always been generally understood to mean a very definite and extreme varying from the expected and prescribed route of the steamer, for some purpose probably not intended at the time of entering into the contract. Later and more recently, and particularly in the English courts, we being familiar with that more than other trades on account of our steamers trading there, some decisions have been so extreme that I think very recently deviation has come to be more restricted, and possibly now covers any change from the originally prescribed route.

Q. When the bills of lading go forward against

(Testimony of Harry L. Evans.)

the drafts and with the other shipping documents, there are no advertisements of routes that go forward, are there? A. No.

Q. You never have known of one, have you?

A. No.

Q. And it is the universal practice not to send anything of that character when the drafts go against the bills of lading, isn't it?

A. As a matter of fact, we go to the extreme, we consider it an extreme, and have gone to that extreme by specifying on [307] the bill of lading the route the steamer will take, the route of ports.

Q. So that when you put your bill of lading out, it shows where the boat is going, on the bill of lading, itself, does it?

A. Yes. That is a more recent practice. That has been done lately on account of these decisions I have referred to.

Q. You were asked with regard to this liberty-to-call clause, or deviation clause in the shipping Board form, which reads, "And to touch at any port or ports in any rotation, or order, in or out of the customary route, and to call at any port or ports more than once." I think you stated also you had been in the business about 17 years. It is a fact that when you first went in business you saw that same clause in bills of lading, is it not?

A. Yes.

Q. And that, really, has been in the oldest bills of lading you have ever seen? A. Yes.

Q. It is a thoroughly established clause?

(Testimony of Harry L. Evans.)

A. Yes, or one similar to it.

Q. That wording, or substantially that identical wording, has appeared in practically all the bills of lading that were in use when you first started in business? A. Yes.

Q. You stated yesterday, I think, that your ships followed a particular route, that is, you shipped, in the main, to certain definite ports? A. Yes.

Q. And I think you also stated you sent some ships off the regular routes at times? A. Yes.

Q. When you do that you put on the bill of lading the ports she is going to, don't you?

A. We do in any event.

Q. You do in any event? A. Yes.

Q. I think you made some statement yesterday in regard to the [308] way the ships out of this port went when they were going to certain European ports; they go in that way and to those different ports, entirely irrespective of the bills of lading, do they not? That is, your testimony is simply that they go to those ports, varying the order of them; am I correct in that?

A. I didn't quite understand your question.

Q. You gave some testimony yesterday with regard to ships going out of San Francisco to certain European ports, I think the United Kingdom and continental ports, and you stated, I think, that the ships went frequently in the geographical order, and frequently in other than the geographical order; am I correct in that? A. Yes.

(Testimony of Harry L. Evans.)

Q. And that was irrespective of the bill of lading clause, as I understand you?

A. You are not speaking of our particular endorsement question, are you?

Q. No. A. Yes, that is correct.

Q. Your ships specify the order in the bill of lading? A. Yes.

Q. And have right along?

A. No, they have not right along; that is a more recent development.

Q. You stated yesterday that you had seen the Shipping Board bill of lading used; it is a fact that it is used on voyages from European ports, United Kingdom and continental ports, to San Francisco, and to Pacific Coast ports, as well as from Pacific Coast ports to the United Kingdom and continental ports. A. Yes, sir.

Q. In other words, there is nothing peculiar about this liberty-to-call clause, or the deviation clause as I read you a moment ago from the Shipping Board form of bill of lading, but it is one that has occurred very many times in bills of lading used at Pacific Coast ports, and also in bills of lading used at [309] European ports; that is correct, is it not? A. Yes.

Q. You gave some testimony with regard to these ships out of San Francisco that went to European ports, United Kingdom and continental ports, I think you specified them; I want to show you some bills of lading; in reference to these bills of lading it is a fact, is it not, Mr. Evans,

(Testimony of Harry L. Evans.)

that there are certain bills of lading which read as this bill of lading that is used here in the Shipping Board form reads with regard to deviation, and there are other bills of lading that are in use that have to do with ports that are beyond, that is, that cover a liberty to deviate and go beyond the ports of call specified in the bills of lading, are there not? A. Yes.

Q. I want to show you these various deviation clauses. You have probably seen them. The Isthmian Steamship bill of lading is yours, isn't it?

A. Yes.

Q. This is one of the bills of lading of the form that you use. I think that was gotten from your office. That is correct, is it not? A. Yes.

Mr. MANNON.—I desire to read this deviation clause in that bill of lading:

> "The vessel with the goods on board either before or after proceeding toward the port of discharge and, although not required by any maritime necessity, may remain in port, proceed by any route and deviate from or change the advertised and intended route at any stage of the voyage and may proceed to and stay at any places whatsoever, although in a contrary direction to or outside of or beyond the usual route to the said port of discharge, once or oftener, in any order, backwards or forwards, for loading and/or discharging cargo, fuel, stores or passengers, and/or for any purpose whatsoever that in the opinion [310] of the

(Testimony of Harry L. Evans.)

shipowners or master may deem advisable. Any such procedure shall be considered not to be a deviation but within the voyage herein intended so fully as if specifically described herein. The above mentioned provisions are not to be considered as restricted by any words of this contract whether written, stamped or printed. The vessel may adjust compasses, dock and go on ways with or without cargo on board, before or after commencing the voyage, and may sail without pilots, tow and assist vessels in all situations and deviate for the purpose of saving life or property."

I offer this bill of lading in evidence in connection with the testimony of this witness, and ask that it be marked Libelant's Exhibit 13.

(The document was here marked Libelant's Exhibit 13.)

Q. One of the services you mentioned here was the Holland-American Line, and the Royal Mail Steam Packet Co.; you are familiar with that service out of San Francisco to the United Kingdom and continental ports, aren't you?

A. Yes.

Q. I show you this bill of lading and ask you if that is not the form which is used and has been used by that line right along?

Mr. GRAHAM.—I object to that question, your Honor, because this witness has not testified that he has any connection with the Holland-American Line, and, therefore, he would not know whether

(Testimony of Harry L. Evans.)

they were using that particular bill of lading, or not.

Mr. MANNON.—This witness has been put on the stand, if it please the Court, to testify to custom. Custom involves two things. One is the contract of carriage specified in the bill of lading, the other is the voyage the ship goes on. Those two things go together. We expect to show that these bills of lading [311] are contracts. We are offering this evidence, with the view, ourselves, that it is not admissible because the bill of lading speaks for itself, and we take it that by offering it we shall not be deemed to have waived our objection to the evidence of custom, or to the particular interpretation by individuals to vary the written contract. We are merely meeting the evidence introduced by opposing counsel.

Mr. GRAHAM.—But Mr. Mannon has asked this witness the question whether that form of bill of lading is in use by that particular line; inasmuch as he is not shown to have had any connection with that line, I do not see how he can know whether it is in use by them, or not.

Mr. MANNON.—He cannot testify to what is done under a specifie bill of lading unless he knows what the ship is, and what the bill of lading is; but I submit to your Honor—

The COURT.—I will overrule the objection.

Mr. MANNON.—Will you answer the question now, Mr. Evans?

A. As far as I know that is their bill of lading.

(Testimony of Harry L. Evans.)

Q. And, as far as you know, it is one that is in use at all the times concerning which you testified yesterday, in 1919, and right on?

A. In 1919 this particular service was not in existence.

Mr. MANNON.—I think the witness who was here from that line yesterday—what was his name, Mr. Graham?

Mr. GRAHAM.—Mr. De Lanoy.

Mr. MANNON.—Yes, Mr. DeLanoy, testified when this service commenced. Isn't that your recollection, Mr. Graham?

Mr. GRAHAM.—Yes, he testified that it commenced in 1920.

Mr. MANNON.—His testimony deals with the period after the "West Aleta" bill of lading on this particular voyage. We objected [312] to it on that ground, but it was admitted in evidence subject to our objection. We want to show just what contract he had. If necessary we can call him back here, if you want us to do that, Mr. Graham, but I think Mr. Evans can testify to this. From the bill of lading which I think the witness can identify, I want to read this deviation clause:

"2. DEVIATION.—The said ship or any other vessel employed in any part of the transport shall be at liberty to delay, or anticipate her advertised sailing date either before or after proceeding towards the port of destination, to proceed to and call at any ports or places whatsoever (although in a contrary direction to or out of or be-

(Testimony of Harry L. Evans.)

yond the accustomed route to the Port of destination) once or oftener in any order and for any purpose whatsoever, and in all such ports, places and sailings shall be deemed to be included within the intended voyage; also to sail, with or without pilots; to have the liberty to swing or manoeuvre, to adjust compasses or be removed from one berth to another or be dry docked with cargo on board whether prior to the commencement of, after the termination or at any stage of the voyage";—

I offer this in evidence and ask that it be marked Libelant's Exhibit 14.

(The document was marked Libelant's Exhibit 14.)

Q. In connection with your testimony you mentioned the Harrison Direct Line, of which Balfour-Guthrie & Co. are agents. I show you a form of bill of lading of the Harrison Direct Line. So far as you know that is the same bill of lading used in 1919 and used up to date for the Harrison Direct Line?

A. Yes. I did not testify as to any particular lines, but I am familiar with the lines. [313]

Mr. MANNON.—We desire to offer this in evidence in connection with the testimony of the witness. I want to call attention to the Deviation clause in it, which reads as follows:

". . . . with liberty for such steamship or substituted steamer, either before or after proceeding toward the port of destination above-

named to proceed to or return to and stay at any ports or places whatsoever, including any in a contrary direction to, or out of, or beyond the customary route, once or oftener, in any order backwards or forwards, for the purpose of trading or for any purpose whatsoever, and all such ports, places and sailings shall be deemed included in the intended voyage."

I ask that this be marked Libelant's Exhibit 15.

(The document was here marked Libelant's Exhibit 15.)

I desire to also offer in evidence the form of bill of lading used by the United American Lines. Mr. Chandler was here from that concern and testified. I am offering this now to avoid calling Mr. Chandler back here. This reads with regard to the liberty-to-call or deviation clause as follows:

"The carrier may substitute another vessel or vessels or tranship the whole or any part of the goods by any other vessel, whether operated by the carrier or by others at the original port of shipment, or at any other place or places, and may forward the goods by other means when necessary but shall be under no obligation to do so. The vessel with the goods on board, either before or after proceeding toward the port of discharge may remain in port, proceed by any route and deviate from or change the advertised and intended route at any stage of the voyage and may proceed to and stay at any place whatsoever, although in a contrary direction to or outside of

(Testimony of Harry L. Evans.)

or beyond the usual route to the said port of discharge, once or oftener, in any order, [314] backwards or forwards," . . . .

I ask that this be marked Libelant's Exhibit 16.

(The document was marked Libelant's Exhibit 16.)

Q. Now, Mr. Evans, these bills of lading with the deviation clause in them like the one that has been read to you from the Shipping Board bill of lading, are in use all over the world, aren't they? A. Yes.

Q. And, so far as you know, they are interpreted in the same way all over the world, aren't they?

Mr. GRAHAM.—I object to that, your Honor. This witness has not testified he knows about the interpretation of the custom all over the world; he has testified to the custom here in San Francisco.

Mr. MANNON.—That is true, but I am cross-examining him on the subject.

The COURT.—Objection overruled.

A. The interpretation, as we are given to understand, is generally the same, although considerably stricter in some countries than in others.

Mr. MANNON.—So far as the shipping men are concerned the interpretation is the same?

A. The understanding is generally the same.

Q. The fact of the matter is that in the maritime business you have particular clauses that have been in general use all of the time that you have been in business, with regard to deviation and other things? A. Surely.

(Testimony of Harry L. Evans.)

Q. And those clauses are usually known to mean a definite thing? A. Yes, sir.

Q. And these bills of lading that I have shown you here, giving the liberty to call, for the ship to go to any given port, or beyond, represent one clause in a bill of lading, and the bill [315] of lading like the Shipping Boards represents another bill of lading, so far as language goes?

A. So far as language goes; yes.

Q. When you say you are given to understand about these matters, the fact of the matter is when you want to find out what your liability is under a bill of lading, and a serious enough question is involved, you employ a lawyer, don't you?

A. We do.

Q. I want also to ask you about the papers that you advertise in; you specified yesterday, I think, "The Guide," did you not? A. Yes, I did.

Q. And you also advertise in the "Daily Commercial News"?

A. I thought I did at that time. I don't remember about at that time. We do at the present time.

Q. What other papers do you advertise your sailings in?

A. We advertise in the fruit canners' paper, I have forgotten the exact title of it.

Q. It is a fact, is it not, that most of the shipments out of San Francisco to the United Kingdom and continental ports are, and ever since 1919 have been, canned goods, or rice, or dried fruits, barley, and things of that character? A. Yes.

(Testimony of Harry L. Evans.)

Q. That is the general character of the shipments? A. Yes.

Q. So that our largest shippers are necessarily the people who deal in those particular products?

A. Yes.

Q. These wine shipments were unusual, so far as you know, weren't they? A. They were.

Q. If a ship is not advertised at all—we have had some testimony here that ships go out of here not advertised at all—how would you expect, as a shipping man, for the shipper, the owner of the cargo, to know where the ship was going, what ports she was to touch at?

A. As a rule, a shipper, except in extreme cases of the market, is more or less disinterested in just what ports she does go to, provided it is a recognized line that keeps [316] generally within a certain sphere.

Q. Of course, you would not think that a shipper, in interpreting where his cargo was going to, and interpreting his bill of lading, would expect, say, that goods destined to Liverpool would go first to the Cape of Good Hope, or some place like that, would you?

A. No, that would be extreme.

Q. And you would feel that if anything happened to the goods while they were on the way to the Cape of Good Hope, under any of these bills of lading, that the owner of the ship would be responsible for taking them down there and losing them, wouldn't you? A. Surely.

(Testimony of Harry L. Evans.)

Mr. MANNON.—That is all.

Redirect Examination.

Mr. GRAHAM.—Q. Do you remember, Mr. Evans, the route of the "West Aleta"? I show you here a copy of the advertisement which appeared in "The Guide," from which you will note that it says Hamburg, Rotterdam and Cardiff.

A. Yes.

Q. You testified that in your idea it would be a deviation to go out of the prescribed route; can you state what you would consider as the custom about the prescribed route in the case of the "West Aleta," out of which you would say it would be a deviation?

A. It is generally accepted, outside of certain extreme decisions that have been given recently, that have been recently given in a country to which we operate, that a steamer may go within certain recognized spheres without deviating. A steamer could not go to the Cape of Good Hope, however, no matter what the wording was. Shipping men would generally concede, although we protect ourselves further beyond that, that a steamer in a specified trade would not be considered as deviating if she kept within those limits. I just testified [317] that there was a distinction between classes of bills of lading. I would like to modify that to the extent that in my opinion the word "beyond" refers rather to their going not just a little above the port to which the boat had

(Testimony of Harry L. Evans.)

been finally destined, but to going beyond that particular sphere.

Q. Just what do you mean by "sphere"? Take the case of the "West Aleta," in the advertisement of the route I have shown to you, what is your understanding of sphere in relation to that named voyage?

A. Well, that is a regular voyage to the United Kingdom and the continent, which would make Hamburg as the extreme north, and Bordeaux as the extreme south, and would include the east coast of Ireland.

Q. So that that is the sphere?

A. Of the United Kingdom and continent.

Q. Do I understand you that in your opinion you would not consider it to be a deviation if it went within that sphere, or that it would be a deviation?

A. I say that in my opinion it is generally the consensus of shipping men, and recognized in the trade, that that is not a deviation, the rotation of ports in that sphere is not a deviation; but we go further, as I have said, and don't take any chances on it, we cover ourselves one way and another.

Q. You testified that you went to the extreme and specified the ports of call, I take it, in the order which the ship makes; do you or do you not consider that that is an extreme measure which you take?

(Testimony of Henry L. Evans.)

A. I think it is extreme; I know of no other line doing it.

Q. You further testified that you only went to that extreme recently; do you remember how recently that has been?

A. It was at the time we resumed the sailings of the Isthmian [318] line following the war, which was early in 1920.

Q. Previous to putting that extreme measure on the bill of lading, how did you clause your bill of lading?

A. We had no clause in the bill of lading, but whenever we followed a course other than the exact geographical route we protected ourselves.

Q. You have been shown these two types of bills of lading, as Mr. Mannon has described them, some with the words "or beyond" and some without the words "or beyond." I will read you again this particular clause, if I may, in the Shipping Board bill of lading, with which you testified you are familiar: "And to touch at any port or ports in any rotation or order, in or out of the customary route, and to call at any port or ports more than once."

I wonder if you can just briefly say what is meant by "in or out of the customary route," in relation to a comparison with the phrase "or beyond." What is your idea of the distinction, if there is any, or do you think there is any distinction?

A. As previously stated, I think that while we

(Testimony of Henry L. Evans.)

were careful to have that put in, or, rather, our advice was to have that put in our bill of lading on account of its possible legal value, I think it is generally accepted that there is a similarity, that the words "or beyond" have not any significance, other than to limit the steamer going beyond the particular route which is generally within the sphere of that trading route.

Q. Do I understand you then to mean that the words "or beyond" in a bill of lading in this particular service, would or would not entitle you to go past, say, Hamburg, or past Bordeaux, which you have named as in the sphere; is that correct, or not?

A. That is my understanding, although, as I say, we have put that word in because we are not certain of the outcome. They [319] may be more restricted.

Q. You further testified that there was a difference, so far as language was concerned; you stressed the difference, so far as language was concerned. Do you mean that there was not any difference, so far as interpretation was concerned?

A. There is undoubtedly a legal difference, but I do not think that in the minds of the shipping community there is a difference. We recognize the difference, and we put it in; rather, we figured that there might be a difference and had it put in. I do not think the shipping fraternity in general makes any great difference in the restriction.

(Testimony of Henry L. Evans.)

Q. Am I right in concluding that you would or that you would not consider your rights the same under a bill of lading with or without that "or beyond" clause?

A. I would consider them the same, but feel much safer the other way.

Q. Do you know of any decisions on this "or beyond" clause, as we have spoken of it here?

A. I think there is a case pending at the present time, but I am not familiar with it.

Q. You are not familiar with the case that was decided in New York recently, are you, on this very question?

The COURT.—Is not the extent to which you can go with the witness to establish a custom? You are asking him now about the legal end of it, aren't you?

Mr. GRAHAM.—He said he had heard of decisions which had gone to the extreme, and I am just asking him if he knew that case. I think that is all, Mr. Evans.

Recross-examination.

Mr. MANNON.—Q. You were asked some questions by Mr. Graham in regard to the meaning of the words "or beyond" in this bill of lading. I take it that so far as you know the [320] meaning of the words "or beyond" there is not any difference in San Francisco, or in Liverpool; in other words, they mean the same in San Francisco, in Liverpool, as in any of the other recognized ports of the world?

(Testimony of Henry L. Evans.)

A. I think the interpretation has been stricter in certain places than in others, yes.

Q. When you speak of "interpretation," you mean the courts' rulings?

A. The courts' rulings.

Q. And when you spoke of "extreme decisions," you meant recent decisions, decisions that have recently been called to your attention, I mean, did you not? A. Very likely.

Q. And you were advised by counsel as early as 1920 that you ought to specify your ports of call in your bills of lading as a precaution?

A. As they put it, as an extreme precaution.

Q. And you have consistently followed that practice since you have been handling shipping since the war period, haven't you? A. Yes.

TESTIMONY OF ALFRED E. WOLFF, FOR RESPONDENT.

ALFRED E. WOLFF, called for the respondent, sworn.

Mr. GRAHAM.—Q. With whom are you associated, Mr. Wolff?

A. The firm of Wolff & Kirschmann.

Q. How long have you been associated with that firm?

A. Six years, since the firm was organized.

Q. What is the general business of the firm of Wolff & Kirschmann?

A. Importing and exporting, shipping.

(Testimony of Alfred E. Wolff.)

Q. What markets do you deal with? Do you deal with any one market, Mr. Wolff?

A. Principally Australia, the South Seas, and the Orient.

Q. Are you interested in the shipping business from the point of view of a steamship operator, or one who ships goods? [321]

A. Primarily, as one who ships goods, and one who buys goods shipped aboard.

Q. I show you a copy of a bill of lading which has been introduced in evidence in this case, and call your attention to a clause which is under discussion here. This bill of lading is the United States Shipping Board Emergency Fleet Corporation, Pacific form, bill of lading. The clause under discussion is the deviation clause, which reads as follows: "And to touch at any port or ports in any rotation or order, in or out of the customary route, and to call at any port or ports more than once." I ask you if you have had any experience with that bill of lading, or know anything about it?

Mr. MANNON.—If your Honor please, I do not desire to lengthen this discussion. We have no pleading here about the custom, itself, that counsel is trying to prove. This witness, however, is engaged in the Australian and South Seas and Oriental trade. I had understood that this custom did not have to do with that trade, and, if not, then we take it that this witness should not testify. So I object to the question on the ground that it is immaterial, irrelevant and incompetent.

(Testimony of Alfred E. Wolff.)

We have no statement of the custom in any pleading; we have no statement from counsel what the custom is that he seeks to prove. We understood it was a custom that did not have anything to do with the Australian, South Seas and Oriental trade.

Mr. GRAHAM.—May it please the Court: Yesterday I told the Court that I believed we had the privilege of showing to your Honor the interpretation of a commercial document. I believe that Mr. Wolff can testify to some relationship which he has had with the making up of this particular document. [322] I further stated that so far as custom was concerned, I thought we would be able to prove, if your Honor wished it, that it was customary to operate in services all over the world, out of the Pacific Coast, out of geographical order. I do not intend to go to that extent, but I will if your Honor wants any evidence on that point.

The COURT.—I will overrule the objection.

A. Yes.

Mr. GRAHAM.—Q. What has been your experience with it, and in what connection?

A. Both as shippers and as receivers of cargo that we have bought.

Q. Do you know anything about the drawing of this bill of lading? A. In what respect?

Q. Do you know by whom it was drawn up?

A. Do you mean the printed form?

Q. Yes, the printed form.

A. No, not absolutely. I know that the form,

(Testimony of Alfred E. Wolff.)

as a whole, is prepared by the Shipping Board, or the Emergency Fleet Corporation.

Q. That is all you know about it?

A. It it were a rail and ocean bill of lading it would have been prepared in conjunction with the Interstate Commerce Commission.

Q. Did you, or did you not, have any connection with the committee appointed in San Francisco to go over the bills of lading?

A. Yes, I was a member of that committee.

Q. Is or is not this bill of lading one of those that was gone over?

A. Yes, it was one of the forms that we studied.

Q. What was that committee?

Mr. MANNON.—I submit that that is immaterial, your Honor.

The COURT.—Yes, I think so. Objection sustained.

Mr. GRAHAM.—Q. I call your attention to this clause which [323] I will read to you, and ask you if you know anything about the customary interpretation of that clause in the trade in San Francisco by users?

A. The average shipper, myself included, would understand that in a bill of lading with that clause in it that if the ship wanted to deviate or change the order of her ports, she had that right.

Q. I show you a copy of the advertisement which appeared showing the route of the steamship "West Aleta," sailing from San Francisco January 6, 1920, which reads Hamburg, Rotterdam, Cardiff,

(Testimony of Alfred E. Wolff.)

and which, you will note, is out of the geographical order. In relation to that route, that would be the customary interpretation of that particular clause?

A. We ship all the time on vessels that make routes of that kind, both from the Orient this way, and from Australia this way; we are shipping at present on vessels that are more or less out of the geographical order, as this is; and under a form of bill of lading of that kind, we would make no objection; in other words, if we wanted a direct shipment, we would specify so when we booked our space, if we had to have a cargo come direct.

Q. So, in your opinion, would the ship be or would it not be authorized to make such a trip as this under such a clause?

A. According to commercial custom, yes; it would make no difference to us.

Q. You testified about your Australian shipments here; can you briefly name how they come? Have you one in mind now?

A. I am booking space now, or will to-day, in a steamer that is going from Australia up to Java, and was originally scheduled to come from Java direct here. I have about 3000 tons of cargo for a port south of Java, and that steamer is going to divert slightly to the south, maybe a day or two sailing, and then come [324] on to San Francisco. The Java cargo will suffer a deviation, but mine will not. It is a customary thing if a buyer must have his cargo direct to specifically

(Testimony of Alfred E. Wolff.)

guard against that in his contract of sale and contract of affreightment.

Q. As to the route of the vessel, what is customary as to notice to shippers, on the part of the steamship company, as to the route they are taking?

A. If it is a regular line, if it is a line service, do you mean?

Q. Yes.

A. If it is a line service, your traffic man, or yourself, will know the customary trade routes in connection with the cargo that is being shipped. If you are in doubt, you will acquaint yourself with the itinerary of the steamer, either by going to the steamship line, or to the clerk, or by referring, as we do in our office, to the advertisement, usually in "The Guide."

Q. You subscribe to "The Guide," do you?

A. We subscribe to "The Guide," and keep two copies hanging in the office for convenient reference.

Q. You do refer to "The Guide"?

A. Yes, daily.

Q. For what purpose?

A. For the purpose of knowing the sailings and the itinerary of boats.

Q. How much reliance do you place on "The Guide"?

A. Knowing the publisher as a man who has intimate knowledge of ships, I place as much reliance, if not more, on "The Guide" than I would on information given by a junior clerk in a steamship company's office, because I know that Mr.

(Testimony of Alfred E. Wolff.)

Empey, the publisher of "The Guide," circulates amongst the heads of steamship companies, and knows the movements and makes a point of keeping his publication up.

Q. Do you subscribe to any other shipping paper in San Francisco?

A. No other daily shipping paper. [325]

Q. So you cannot testify as to advertisements in any other shipping paper?

A. No. We used to subscribe to the "Journal of Commerce," and before that to the "Commercial News," but they don't give the same service, and don't cover the ground "The Guide" does.

Q. What about the service of the "Daily Commercial News" relative to the advertisement of routes, what can you say about that?

A. The advertising might be the same, but there was not the same degree of interest on the part of the publisher in keeping the advertising up to date. If there was a change in a vessel's schedule and it came to the knowledge of Empey, he would go to the steamship company and suggest changes in the advertisements, whereas the "Commercial News" might run stale ads.

Q. How about the comparative reliance by the shipper on the "Daily Commercial News" and "The Guide"?

A. As far as we were concerned, we did not take the "Commercial News" for shipping news. We took "The Guide" because we could rely on it for shiping news.

(Testimony of Alfred E. Wolff.)

Cross-examination.

Mr. MANNON.—Q. You will bear in mind that clause that was in that Shipping Board Bill of Lading that Mr. Graham read to you?

A. The deviation clause?

Q. Yes. You said that that gave the ship the right to deviate.

A. I did not say so legally, I said commercially we look on it that way.

Q. The answer, as I noted it, that you gave, was that that clause means that if the ship wants to deviate she has the right to. You mean that answer, didn't you? A. Yes.

Q. Just what do you mean when you say a ship has the right to deviate?

A. I cannot answer that from a legal standpoint, I [326] can only speak of it from a commercial viewpoint; is that what you mean?

Q. Yes, I cannot ask you beyond that.

A. From a commercial viewpoint, we are interested in whether we need to get our cargo to its destination quickly, or more cheaply. As a rule, we are interested in the cheapest method. Freight in tramp steamers that may go here, there, and everywhere, is usually a little cheaper than in a fast mail steamer that goes the most direct way. Insurance on both is substantially the same. It doesn't make any difference how many ports a steamer calls at. We usually cover at a flat rate of insurance. Now, I go to a buyer, and he wants to buy for quick delivery; I will go to the steamship company, and say, "Have you a steamer going

(Testimony of Alfred E. Wolff.)

direct" otherwise I don't care whether she deviates, or not.

Q. You use that word "deviate" again. I want you to tell me what you mean by "deviation"—is it something that a boat does? A. Yes.

Q. What is it that a boat does that is a deviation?

A. I do not know that I have ever given specific thought to that. It would be a variation in the voyage.

Q. A variation in what voyage?

A. In any one, or in an announced voyage.

Q. Under that clause, however, the ship is allowed to deviate from the voyage, or go out of her voyage, as you understand it?

A. I would so understand it.

Q. For instance, a ship that is destined for Australia would be authorized to go to, say, Kobe, Japan.

A. Well, you come there to a question of reasonableness and commercial frustration that becomes a matter for lawyers to discuss.

Q. But as a matter of commercial usage, you would not think [327] she could go to Japan under that clause if she were destined for Australian ports?

A. Not under ordinary circumstances, no.

Q. You would consider that a deviation, would you, to Japan?

A. I think that would be the word. I don't know. It might be even worse than a deviation.

Q. Do you think there is anything worse for a ship owner than deviation?

(Testimony of Alfred E. Wolff.)

A. Oh, yes, there are lots of things.

Q. But you think that a vessel bound for Australia could go to Java, say, under this clause?

A. Yes.

Q. Suppose you didn't have that clause in the bill of lading, at all, could she go to Java?

A. It has been the attitude of shippers, generally speaking that she could not. That deviation clause gives the boat rights that she otherwise would not have.

Q. That is, the deviation clause is put in to give the vessel protection?

A. Yes; most clauses in the bill of lading are put in to give the vessel protection.

Q. And the deviation clause, the one that has been read to you in the bill of lading from the Shipping Board, is put in for that reason?

A. Yes. It is not unusual, it is in other bills of lading.

Q. And substantially that clause has been in many of the bills of lading that you have handled?

A. I don't know of a bill of lading that doesn't have an equivalent clause.

Q. There are bills of lading, aren't there, which have wider deviation clauses than this one?

A. Since cases have been brought up under that bill of lading, there have been efforts to amend some of the lines bills of lading so as to make it possible to cover the wide world in a deviation clause, but I do not believe, myself, they are successful. [328]

(Testimony of Alfred E. Wolff.)

Q. But, so far as you know, there may have been cases brought up long before that bill of lading was drawn up? A. Oh, yes.

Q. You have not gone into that question, have you?

A. I have not gone into the legal end of it, at all.

Q. That would become a question for the courts?

A. Yes.

Q. For instance, you would not think that under any bill of lading which you have seen, say where a vessel was destined out of San Francisco for United Kingdom ports, that she would be entitled to go in any other route than through the Panama Canal, or through the Straits of Magellan?

A. Not under ordinary circumstances, but it is conceivable that *force majeure* might cause her to do that.

Q. But that would be permitted under another clause, wouldn't it? A. Yes.

Q. So these bills of lading are used to determine really where the boat is to go, and what she is to do with the goods? A. Yes.

Q. The bills of lading stand for the goods, don't they? A. Yes, they do.

Q. In your business it is ordinary for you to send a draft against the bill of lading through the banks for collection? A. Yes.

Q. That is the way you do your foreign business, isn't it? A. In the main.

Q. And when that is done, you don't send any

(Testimony of Alfred E. Wolff.)

advertisement about the ship, or anything of that character, with the bills of lading, do you?

A. No, but as a rule we sell or buy for foreign shipment; in other words, we are selling now in December for March and April shipment, and as fast as we book our space in a March-April steamer, we will name the steamer to our buyers, and if they don't know the itinerary and they ask us, we will give it to them, or we tell them voluntarily, or they can go [329] to the agent of the line and find out. As a general rule, the buyers know long before they get the documents the line and the steamer, and the agent of the vessel.

Q. If you book March and April space now in a tramp steamer, you would not expect your itinerary to be known, would you?

A. Oh, yes, pretty much. I am talking now of pretty early shipments, March-April is not as far off as it seems. I am booking now for March-April in a Shipping Board steamer, and I know every port she is scheduled to go to between now and then; they may ring in an extra port, but it is unlikely; it is possible, they have the right to do so; but under my booking, they have not a right to ring in an extra port after I put my cargo on board for direct delivery, because I have specifically protected myself on that, my buyer wants the goods direct, he wants them as quickly as he can get them.

Q. And when you put the goods on board, you will get your bill of lading, won't you?

(Testimony of Alfred E. Wolff.)

A. The buyer will on the other side.

Q. Don't you get it here?

A. I am speaking now of import stuff.

Q. If you are bringing something in from United Kingdom ports, there is a bill of lading issued there, isn't there? A. Yes.

Q. And the bill of lading stands for the goods?

A. Yes.

Q. That bill of lading, as a matter of fact, is traded in just as the goods are? A. Yes.

Q. The people you are in contact with, that is, the people you are doing business with, might dispose of those goods, might sell them, before they come into their possession.

A. Then they will get their money in exchange for the bill of lading.

Q. That might be done before the goods are delivered, in other words, while the goods are afloat, they might sell the goods? [330] A. Yes.

Q. And they will exchange the bill of lading?

A. Yes.

Q. That is common practice in the world's trade, isn't it? A. Yes.

Q. And they necessarily have to rely on what the bill of lading says, don't they? A. Yes.

Q. This clause that your attention was called to in the Shipping Board bill of lading form is one that to your knowledge has been used from Pacific Coast ports to Oriental ports?

A. Yes; it is common in all ports of the world, it or its equivalent.

(Testimony of Alfred E. Wolff.)

Q. There is nothing peculiar in that deviation clause to San Francisco, is there, or in that bill of lading? It is one that is used everywhere.

A. Yes.

Q. It is used in all United Kingdom ports, Oriental ports, and Pacific ports?

A. Yes. It is based on the needs of the vessel, in case the vessel has to deviate or does deviate for profit.

Q. That bill of lading is used in all the ports of the world, substantially, isn't it? A. Yes.

Q. And, to your knowledge, ever since the Shipping Board vessels started operation after the war, that bill of lading, or one having substantially that deviation clause, has been in use all over the world by the Shipping Board vessels: That is correct, isn't it?

A. Substantially that, yes.

Q. And substantially that deviation clause has been used by many other ships than Shipping Board ships? A. Yes, sir.

Q. There is nothing peculiar in its use out of San Francisco as compared with its use anywhere else in the world, is there?

A. Not so far as I know. [331]

Q. And the customary interpretation of shipping men is not bounded by national lines; you deal with Oriental ports, and with Australian ports, you know those shipping people, and you sell your goods to them and buy goods from them: That is right, isn't it? A. Quite right; yes.